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TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1895.

No. 711.

JOHN GIBSON, PLAINTIFF IN ERROR,

vs.

THE STATE OF MISSISSIPPI.

IN ERROR TO THE SUPREME COURT OF THE STATE OF MISSISSIPPI.

FILED AUGUST 22, 1895.

(16901.)

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1 *Organization of court.*

STATE OF MISSISSIPPI,
Washington County:

Be it remembered that a regular term of the circuit court for the transaction of criminal business in and for the county of Washington and State of Mississippi was begun and held at the court-house of said county, in the city of Greenville, on this the 7th day of January, A. D. 1895, the day fixed by law for the holding of said court. There was present the Honorable R. W. Williamson, judge of the fourth judicial district of the State of Mississippi, presiding; Walton Shields, district attorney of said district; John L. Griffin, sheriff of Washington County, and Wm. K. Gildart, clerk of the circuit court of said county of Washington.

The defendant was arraigned at a former term of this court and plead "not guilty," as shown by the minutes of said term, to wit, January term, 1893.

Bill of exceptions.

The said term was held for the transaction and determining the criminal business of said court. Among others the following proceedings were had, to wit:

THE STATE
vs. } No. 4076.
JOHN GIBSON.

Said case being called for trial, the State announced ready, and the defendant thereupon in his own proper person presented his petition to the court, wherein he moved the court to transfer this case to the
2 United States circuit court for western division of the southern district of Mississippi, whereupon court overruled said motion.

Petition to transfer to U. S. circuit court.

THE STATE OF MISSISSIPPI,
Washington County:

To the honorable circuit court of said county, R. W. Williamson, circuit judge of the fourth judicial district of the State of Mississippi, sole presiding therein, at the January term thereof for the year 1895:

This petition respectfully shows unto this court that John Gibson, a citizen of said State and of the United States of America, a negro of the African de'cent and color black. That under the constitution of the State of Mississippi, which was adopted in constitutional convention in Nov., 1890, it prescribes that the qualification for persons to serve as jurors in said State shall be that the ability of said citizens, qualified electors of the county and State, male, being citizens thereof, not having convicted of specified crimes, shall be to read and write; but the legislature shall provide by law for procuring a list of persons so qualified to draw from of grand and petit jurors for each term of the circuit court (constitution of Mississippi, sect. 264). Section 2358 of the Code of Mississippi for 1892, adopted 1st day of April, 1892, and

was in force at the time of the finding of the bill of indictment filed herein against relation, provides that at the first meeting of each year, or as soon as practicable thereafter, the board of supervisors shall make a list of persons to serve as jurors in the circuit court for the next two terms to be held more than thirty days afterwards, and as a guide in
3 making the list they shall use the registration books of voters, and shall select and list the names of qualified persons of good intelligence, sound judgment, and fair character, and shall take them, as nearly as it can conveniently (can), from the several districts, in proportion to the number of the qualified persons in each, excluding all who have served on the regular pannel within two years, if there be not a deficiency of jurors. Relator states that under sec. 283 of the new constitution of Mississippi the indictment returned against him should have been by a jury of the grand inquest of the said county, under the laws of the Code of said State, adopted in 1880, because the crime for which this indictment was returned is alleged to have been committed January, 1892, before the statute of 1892 took effect.

Relator states that under the laws of said State, provided by the code of 1880 thereof, the only qualifications required as shown by Sec. 1661 of said code, to wit: "All male citizens of the United States and not being under the age of twenty-one years nor over the age of sixty years and not having been convicted of any infamous crime shall be qualified to serve as jurors within the county of their residence." Sec. 1664 of code of 1880 also provides that the board of supervisors of each county shall, at least twenty days before every term of the circuit court, select twenty persons competent to serve as jurors in said county to be taken, as nearly as conveniently may be, in equal numbers from each supervisor's district of the county, who shall serve as grand jurors for the next ensueing term of said court."

Relator states that at the time the said grand jury of said county was elected, empannelled, and charged by this court at the December term, 1892, a great federal of his was abridged, viz: The civil right
4 guaranteed him under the fourteenth amendment to the Constitution of the United States, particularly, to wit: No State shall deny to any person within its jurisdiction the protection of the laws.

Relator states that on the 9th day of January, 1892, Robert Stinson, a white man, was killed at Refuge plantation in said county, and that he was accused of the homicide; that prosecution against him had been commenced before the adoption of the Code of 1892; that by reason of the great prejudice against him by the officers charged with the selection of the said jury of grand inquest for the said December term of the said circuit court, which officers so charged are all members of the white race, and the relator herein being a member of the black race, black in color. Although at the time of selecting the grand jurors for the said December term, 1892, there were in the five supervisors' districts of the said county of Washington 7,000 colored citizens competent for jury service of the county of Washington, State of Mississippi, and 1,500 whites qualified to serve as jurors in said county, there had not been for a number of years any colored man ever summoned on the grand jury of said county court; and that the colored citizens were purposely, on account of their color, excluded from jury service by the officers of the law charged with the

selection of said jurors. Relator states that by reason of the great prejudice against him in this matter that the said officers of the law charged with the selection of said grand jurors for the December term, 1892, on account of his color, being that of a negro, black, and the deceased being that of a white man of the white race, in selecting persons to serve as grand jurors at said term, all colored men were purposely on account of their color excluded by said officers; and that the said grand jury did then and there, being all white men purposely selected on account
5 of their color, presented the bill of indictment against relator for the murder of Robert Stinson aforesaid, on account of his color, and pray summon for witnesses to prove same. Relator avers that by reason of the great prejudice against him on account of his color, he could not secure a fair and impartial trial by an impartial petit jury of the county of Washington, State aforesaid, and pray an opportunity to subpœna witnesses to prove the same, and, therefore, after hearing same, doth pray the removal of his cause from this court to the United States circuit court for the western division of the southern district of Mississippi; and that record hereof be properly certified to said court by an order from this court. And in duty bound doth forever pray, &c.

JOHN GIBSON.

STATE OF MISSISSIPPI,
Washington County:

This day personally appeared before me, the undersigned circuit clerk of said county, John Gibson, who, on oath, state' that the facts set forth in the foregoing petition are true and correct, to the best of his knowledge and belief.

JOHN GIBSON.

Sworn to and subscribed to this the 7th day of Jan., 1895.

WM. K. GILDART, *Clk.*

Filed Jan. 7th '95.

WM. K. GILDART, *Clk.*

Order overruling petition.

STATE OF MISSISSIPPI
vs.
JOHN GIBSON. } No. 4076.

6 This cause coming on to be heard upon petition on part of defendant for removal of his cause and trial from the circuit court of Washington County to the United States circuit court for the western division of the southern district of Mississippi. And the court upon petition overruled same and denied said petition. The defendant then and there excepted. (January 7th, 1895.)

Thereupon the defendant in his own proper person and by his attorney demanded that a special venire of fifty men be summoned to try said case. The regular jury box for said court being produced for the purpose of drawing therefrom the said special venire, the defendant then and there in his own proper person and by his attorney, moved the court to quash said jury box, because the same was an illegal jury box, and also because there was but few names therein, which said motion was by the court sustained.

Motion to quash jury box.

STATE OF MISSISSIPPI
vs.
JOHN GIBSON.

Now comes John Gibson, defendant in this cause, and moves the court that the jury box now tendered in court from which the special venire is proposed to be drawn be quashed and that the court order the sheriff to summon said venire as the law directs, for the following causes:

(1) Because the said jury box was not prepared and provided with names of persons who had been regularly drawn by the board of supervisors for the county of Washington.

7 (2) Because the said board did not use the registration roll of the county as their guide in selecting names of persons to serve as jurors at the last meeting at which said board purported to select a list of jurors to serve as such in said county, and the said box is exhausted.

(3) Because the record of said board does not show at said last meeting what names were selected by them, and defendant avers that at said meeting no original list was prepared by said board, but that the list of names contained in the said jury box are not taken from a copy from the original list prepared by said board because there was no original list prepared by the said board, and the jury box prepared from a list purporting to be a regular jury list, and now in court, from which said special venire is proposed to be drawn, is an illegal jury box, and defendant pray' an opportunity to be given him to summon the several members of said board of supervisors and other witnesses to further prove the allegations of this motion, for all of which several allegations he is able to prove.

JOHN GIBSON.

STATE OF MISSISSIPPI,
Washington County:

This day personally appeared before me, circuit clerk of said county, John Gibson, who swares that the allegations in said motion are true to the best of his knowledge and belief.

JOHN GIBSON.

Sworn to and subscribed to before me this the 7th day of Jan., 1895.

WILLIAM K. GILDART, *Clk.*

Filed Jan. 7th, 1895.

WM. K. GILDART, *Clk.*

8 *Order sustaining motion to quash jury box.*

STATE OF MISSISSIPPI
vs.
JOHN GIBSON. } No. 4076.

This cause coming on to be heard on defendant's motion to quash jury box, and the court being sufficiently advised thereof, there also appearing that the said box was exhausted, doth order that the same be quashed, the defendant being present in court. (Jan'y 7th, 1895.)

The court then ordered a writ of special venire facias to issue, directed to the sheriff of said county, commanding him to summon from the body of the county of Washington fifty good and lawful men.

Original order for special venire.

STATE OF MISSISSIPPI
vs.
JOHN GIBSON. } No. 4076.

This day appeared the defendant, John Gibson, in his own proper person, who demanded a special venire of fifty men, and the court having allowed said special venire facias issue to the sheriff of Washington County, Mississippi, commanding him to summons from the good and lawful body of Washington County the said fifty men, to be and appear before this court on Friday, January 11th, 1895, at 9 o'clock a. m., to serve especially as jurors in this cause, and that the sheriff serve on the defendant or his counsel a copy of this writ of venire facias, together with his return thereon, showing the names of the persons so summoned, and also a copy of this indictment aforesaid, at least one entire day before said 11th day of January, 1895. (January 7th, 1895.)

9 *Copy of special venire.*

The State of Mississippi, to the sheriff of Washington County in said State:

You are hereby commanded to summon fifty men from the good and lawful body of Washington County: G. A. Hall, Louis Dameron, H. C. McGee, J. W. McMath, L. A. Sanders, O. F. Pepes, D. B. Holmes, J. R. Holcomb, George Love, T. W. Dunn, J. R. Emsley, Chas. H. Clark, J. W. Lester, W. P. Dinkin, Tom. Kelly, J. E. Branton, A. J. Aldridge, J. B. Williams, Alex Daniels, Henry Downs, J. B. Smith, C. T. Harrison, S. J. Hebron, J. S. Johnson, Chas. Birdsong, L. A. Askew, D. W. Taylor, J. T. Brooks, W. E. Davis, Abe Mathews, L. Elkas, B. H. Sutton, R. Sessions, J. H. Collier, John S. Davis, C. C. Dean, J. C. Johnson, J. R. Kunnert, S. P. Stovall, George Kirkland, Tom Kennedy, John Kennedy, H. C. Beming, E. W. Baker, Mauriee Rosenstock, E. T. Worthington, W. W. Worthington, W. C. Hope,
10 W. K. Burford, J. A. Bezzell, if to be found in said county, to be and personally appear before the circuit court of the county of Washington, in said State, at the court-house in the city of Greenville, Mississippi, on the 11th day of January, A. D. 1895, at 9 o'clock a. m. to serve as a special venire for the trial of the case of the State of Mississippi vs. John Gibson, at a term of said court to be held at the court-house aforesaid, in said county and State, commencing on the 1st Monday of January, A. D. 1895, and have there then this writ, with your return thereon indorsed.

Given under my hand and the seal of said court, and issued the 7th day of January, A. D. 1895.

[SEAL.]

WM. K. GILDART,
Circuit Clerk, Washington County, Miss.,
By CHAS. T. JOHNSON,
Deputy Clerk.

Returned executed upon the within-named parties.
Given under my hand, this the 11th day of Jan'y, A. D. 1895.

JNO. L. GRIFFIN,
Sheriff of Washington County, Miss.,
By D. L. McLEAN,
Deputy Sheriff.

On the 11th day of said January, 1895, being the day on which said writ special venire facias was summoned to appear, and being the day previously set by order of said court for the trial of said case, said case was called by the court and the State announced ready. The defendant in his own proper person and by his attorney moved the court to quash the writ of special venire facias in said case which had been returned by the sheriff, and said special venire, because of the insufficiency and incompleteness of the order made and entered on the said 7th day of Jan-
11 uary, ordering said writ to issue. The court overruled said motion and ordered the clerk of said court to amend the minutes so as to correspond with and state what was done on the 7th day of January, 1895.

Motion to quash the special venire.

THE STATE OF MISSISSIPPI
vs.
JOHN GIBSON.

Now comes the defendant in this cause, John Gibson, and moves the court that the special venire ordered by the court on the 7th day of January, 1895, and the first of the January criminal term of this court, be quashed, and that the court order a special venire summoned according to law, for the following causes, to wit:

First. Because the record shows that the court ordered the sheriff of Washington County on said date, in said State, as follows:

"To the Sheriff of Washington County, in said State: You are hereby commanded to summon fifty men from the good and lawful body of Washington County," &c.

Said order fails to command the sheriff to summon "persons qualified as jurors," or to summon said fifty men, "jurors," as required by law, and further, said writ and return is not in accordance with the law.

Second. Because the order directs the sheriff aforesaid to summon said fifty men to serve as special venire in the case of State vs. John Gibson, while the order should have directed the sheriff to summon fifty men or persons as jurors, and to serve as jurors in the case of the State vs. John Gibson as special jurors.

JOHN GIBSON.
C. J. JONES, *Atty.*

12 Filed Jan. 11th, 1895.

WM. K. GILDART, *Cl'k.*

Order overruling motion to quash venire.

STATE OF MISSISSIPPI
vs.
JOHN GIBSON. No. 4076.

This cause coming on to be heard upon motion to quash the special venire, and the defendant being present in court, and the court after hearing same doth order that the same be overruled. Defendant then and there excepted.

Order for special venire as amended.

STATE OF MISSISSIPPI
vs.
JOHN GIBSON. } No. 4076.

This day appeared the defendant, John Gibson, in his own proper person, who demanded a special venire of fifty men, and the court having allowed said special venire of fifty men, and the said jury box having been quashed on application of defendant, it is ordered that special venire facias issue to the sheriff of Washington County, Mississippi, commanding him to summon from the good and lawful body of Washington County said fifty good and lawful and qualified jurors to be and appear before this court on Friday, January 11th, 1895, at 9 o'clock a. m., to serve especially as jurors in this cause. And that the sheriff serve on the defendant or his counsel a copy of this writ *writ* of venire facias, together with his return thereon, showing the names of
13 the persons so summoned, and also a copy of this indictment aforesaid, at least one entire day before said 11th day of January, 1895. (January 7th, 1895.)

To which action of the court defendant then and there excepted. The defendant then announced himself ready for trial. The jury from said special venire to try said cause was then and there chosen, selected, empannelled, and sworn to try said case. The district attorney read the indictment to the jury.

Indictment.

STATE OF MISSISSIPPI,
Washington County:

In the circuit court in and for said county, at the December term thereof, in the year of our Lord 1892.

The grand jurors of the State of Mississippi, taken from the body of the good and lawful men of the county of Washington, duly elected, empannelled, sworn, and charged at the term aforesaid of the court aforesaid to inquire in and for the body of the county aforesaid in the name and by the authority of the State of Mississippi, upon their oath present that one John Gibson, late of the county aforesaid, on the 12 day of December, in the year of our Lord 1892, with force and arms, in the county aforesaid, unlawfully one Bob Stinson, a human being, wilfully, feloniously, and of his malice aforethought did then and there kill and murder, against the peace and dignity of the State of Mississippi.

WALTON SHIELDS,
District Attorney.

14 (Endorsement on indictment:) No. 4076. Circuit court, Washington County, December term, A. D. 1892. State of Mississippi vs. John Gibson. Murder. A true bill. Merritt Williams, foreman grand jury. Witnesses: Capt. W. H. Drummond, W. D. Love, Bob Redric, Elija Jack, Jack Monroe, T. D. Apple, Dan Scott, Dan McLean. Filed, and capias issued December 16th, A. D. 1892. W. K. Gildart, clerk.

The defendant in his own proper person entered his plea of not guilty.

The following evidence on behalf of State was introduced:

State's evidence.

Mr. T. D. APPLE, witness for the State, sworn, testified as follows:

Q. Do you know John Gibson?

A. Yes, sir.

Q. Is that John over there?

A. Yes, sir.

Q. He is charged with the murder of Bob Stinson. Did you know Bob Stinson in his lifetime?

A. Yes, sir.

15 Q. Where did he live?

A. Lived on Refuge.

Q. What was his occupation?

A. He was assistant manager on Refuge plantation under Capt. Drummond.

Q. Where did John Gibson live?

A. John was one of the wage hands there.

Q. What day of the year, and what year was it, Bob Stinson was killed?

A. Jan. 9th, 1892; about three years ago, now.

Q. Well, just state to the jury if you saw Mr. Stinson on the evening of the killing—before the killing—and state to them what you know about it.

A. Well, Jan. 9th was Saturday, the day for settling with the day hands at Refuge store. Mr. Stinson worked the day hands on the place then, and this negro, John Gibson, with three or four others, got money at the time; they came in there that evening and there was something short of what they expected, twenty cents he had docked them on their time, and they all went to the office and settled, and I believe did not have much to say about it except John; he went to the bookkeeper.

Q. Who was the bookkeeper?

A. Mr. Beddis; and he was not satisfied about his time. He said he was docked, and he wanted that time, and demanded it, and wanted it.

Q. How much had he been docked?

A. Twenty cents. Mr. Stinson was down there that evening, and he came out in the store and asked him to correct it; that his time was wrong, and he wanted it.

Q. Who said that?

A. John; and Mr. Stinson told him he had docked him and three or four others, and it would have to stay that way; that he would not change it.

16 Q. Did he say why he had docked him?

A. For some misdemeanor in his work; he had not done his work as he had instructed him. John did not like it, and he went to Mr. Stinson and told him he wanted the balance of his time; and he told him he could not get it, that he had docked several others with him and it would have to stay that way; and John told him he would have to have his time, that he wanted it.

Q. In what manner did he say this?

A. Well, he said it in a pretty abrupt way or manner. He went to him two or three times about it. That occurred in the back end of the store, the office; it was not open with the store; there was a wall or partition between the office and store. I was the only white man in the store at the time. Mr. Beddis, the bookkeeper, was in the office. I was waiting on customers. Being Saturday evening there was a pretty big crowd around; and it was cold and the crowd was around the stove, and they had crowded around the fire considerably. When John came to Mr. Stinson about his time I heard Mr. Stinson tell him to go off, he did not want to have any trouble with him; and John went up to the stove.

Q. Where had John been when he was talking to Mr. Stinson.

A. In the back end of the store where they cut the meat for the hands and sold the meat.

Q. It was in the back end of the store he was talking to Mr. Stinson; where did he go when he left him?

A. The stove was located in the middle of the store and twenty feet or more from the meat bin. He went up to the stove where the crowd of darkies were around the stove and I heard him remark that no
17 son of a bitch could beat him out of his time that way; that he was going to have it.

Q. Who said that?

A. John did. I called John then and told him he could not talk that way to a white man; I would not allow it; to get away from there; and he went off then. And I also spoke to Mr. Stinson about it, and he said he did not want to have any trouble with John; he did not show any disposition to have, or to have any fuss at all. John left then. After I got after him he left the store and I never saw anything more of him that evening, and it was not very long after that before Mr. Stinson left.

Q. John left the store first?

A. Yes, sir; and Mr. Stinson walked out of the store, and a little while afterwards I saw him walking on up to Capt. Drummond's house, and I never saw him any more until I saw him dead that night.

Q. How long after that before you saw him dead?

A. It was, I suppose, about 4 o'clock in the evening when he left the store, and in January the nights are pretty long, and 4 o'clock is nearly sundown; it was about good dark, and a darkey came in the store and said Mr. Stinson was shot.

Q. About good dark you heard of his being shot, you say?

A. Yes, sir.

Q. You said Mr. Stinson and Gibson were in the back part of the store when Gibson demanded of him several times that he should be paid his twenty cents; and after Mr. Stinson refused to pay that John came to the middle of the store where the stove was, and a lot of darkies had crowded around there, and he says there that no son of a bitch
18 should beat him out of twenty cents?

A. No son of a bitch should beat him out of his time.

Q. And you heard him say that and spoke to him as you have detailed to the jury?

A. Yes, sir.

Q. Where did Mr. Stinson board?
A. He boarded at Capt. Drummond's.
Q. Did he have a room there?
A. Yes, sir.
Q. You state this was on Saturday night?
A. Yes, sir.
Q. What county and State was this place in?
A. Washington County, Mississippi.

Cross-examination:

Q. What were your duties at that store?
A. I was clerking in the store.
Q. Mr. Beddis paid off the hands and paid them from the time as given in by Mr. Stinson?
A. On the time roll.
Q. Mr. Stinson was what you might call a subagent, was he, under Capt. Drummond?
A. Yes, sir.
Q. Capt. Drummond was the principal agent on the plantation?
A. Yes, sir.
Q. What was the length of the store?
A. I think the store and office combined is one hundred feet, perhaps 104 or 105 feet; I think a hundred feet would cover it.
Q. What was the width of the office; how much of the store, in other words, was or would the office take off?
19 A. I think the office took up about twelve or fourteen feet.
Q. That would leave about 86 or 88 feet in the clear for the store?
A. Yes, sir; that included the ten feet. The front gallery was ten or twelve feet, and it included that.
Q. That one hundred feet you spoke of included the gallery also?
A. Yes, sir.
Q. Was there an office on each side?
A. A bedroom on one side.
Q. And the office on the other and a little passageway between?
A. Yes, sir.
Q. Where were these scales located where you were weighing meat?
A. They were located right behind the bedroom.
Q. Was the bedroom on the north or south side?
A. South.
Q. The store fronted west, didn't it, towards the levee or river?
A. Yes, sir.
Q. So that the office and bedroom were at the eastern extremity of the store?
A. Yes, sir.
Q. And these scales were behind the office, I believe you said?
A. The scales were behind the bedroom—behind or in front, or whatever you might call it.
Q. You stated that the store was about in the middle of the space occupied by the store proper, between the office and bedroom and front door?

A. Very near the center of the front door and the door that
20 entered the office; very near the center of those two doors.

Q. You stated that this conversation occurred between Mr. Stinson and defendant in the rear part of the store?

A. Back where they were cutting meat.

Q. At the scales?

A. Yes, sir.

Q. And that after that conversation that the defendant came up to the stove where there was a large crowd of negroes and made use of this expression?

A. Yes, sir.

Q. Did he address anyone particular, or did he just make use of the remarks?

A. He just made the remarks I did.

Q. Without addressing anyone?

A. That was all I distinguished.

Q. Mr. Stinson did not hear that, did he? You say you told him about it afterwards.

A. I could not say whether he heard it or not.

Q. How many people do you think were in that store?

A. Well, that would be a matter of supposition.

Q. Fifty or seventy-five—somewhere along there?

A. About forty at that time, sir, more or less.

Q. After you had heard the defendant make use of this expression, "No son of a bitch can beat me out of my time that way," and your speaking to him about it and telling him that he could not talk that way, you say that he left the store at once?

A. He left pretty soon. I do not remember the exact time, but it was not but a few minutes until he left.

Q. How long did you say it was after that before Mr. Stinson left the store?

A. I do not remember that time there, but it was a short time, though.

21 Q. How far is the store from Capt. Drummond's house?

A. Well, I suppose it was three hundred yards.

Q. The house is north of the store, isn't it?

A. Yes, sir.

Q. The store and Capt. Drummond's house are just east of the levee; are they not situated on the Miss. River, east of the levee?

A. Yes, sir; one is about twenty or thirty steps from the levee and the other is a hundred yards.

Q. Which?

A. The store is nearer to the levee and the house is further off.

Q. Does the road running from the store and Capt. Drummond's house run north and south?

A. Yes, sir.

Q. How far does the road run north and south; what stretch is there there?

A. There is a stretch there that is perfectly straight, and I think the levee is straight and the road runs along by the side of it for a quarter of a mile; I suppose it is a quarter.

Q. How far from the store does the fence commence which surrounds the enclosure there around Capt. Drummond's house?

A. It is not over fifty steps from the front gate to the corner nearest the store; it is about fifty steps from the front gate to the corner of the yard nearest the store. It is three hundred yards from the store to Capt. Drummond's house, more or less.

Q. There is a fence surrounding Capt. Drummond's house?

A. Yes, sir.

22 Q. Now, I want to know how far that fence runs down south towards the store.

A. That is what I was telling you before; the road goes direct and straight from the house to the public road, and there is a gate right there; I suppose it is fifty steps from that gate to the corner of the yard towards the store.

Q. So that it was fifty yards from that gate to the corner of the yard, and that would make it two hundred and fifty yards, about; taking off fifty yards, it would make it 250 yards from the corner of the fence to the store?

A. Yes, sir.

Q. You say it was about 4 o'clock when this conversation took place?

A. I supposed it to be about that time.

Q. You say it was about good dark when he was killed?

A. Yes, sir.

Q. That was a couple of hours afterwards or several hours afterwards?

A. I suppose it was between 6 and 7 o'clock or 8 o'clock; I do not remember the time exactly.

Q. This was a public road, was it?

A. Yes, sir.

Q. What was the condition of that road that day, muddy?

A. Yes, sir, a little muddy; it had been raining. I know it was cold and froze up next morning; very cold.

Q. And the road was frozen next morning?

A. Yes, sir; but it was not frozen that night; it was muddy.

23 Q. The defendant then came up from the scales—from back here where he had had this talk with Stinson—and came to this store, where it was surrounded by people, and made use of the expression that you got after him about, and told him he could not use any more, and went out of the front door and left?

A. Yes, sir.

Redirect examination:

Q. In what direction would a man going from the store to the house take?

A. This road up here; he would go up the road from the front, right straight up that road as he walked alongside of the fence, and go in that gate.

Q. How did that gate open?

A. The gate opened on the inside.

Q. Do you recollect the hinges, whether on this north or south post?

A. The gate opened from here around this way; the hinges were on the north side.

Q. When you got there that night did you examine Mr. Stinson's clothes?

A. That night? No, sir.
Q. Did you examine them next morning?
A. No, sir.
Q. Have you the clothes here?
A. The clothes are here; yes, sir.

DAN SCOTT, witness for the State, sworn, testified as follows (colored):

Q. Where did you live in Jan., 1892?
A. On Refuge Plantation.
Q. Did you know Mr. Robert Stinson?
A. Yes, sir.
24 Q. Where did he live?
A. He lived down there on Refuge.
Q. Do you know John Gibson?
A. Yes, sir.
Q. Did you know him then?
A. Yes, sir.
Q. Do you see Gibson here?
A. Yonder he is [indicating the defendant].
Q. Did anything occur to Mr. Stinson in January, 1892, that you know of?
A. I heard a few remarks that was made.
Q. Do you know whether Mr. Stinson is alive or dead?
A. He is dead now, so they tell me. I have not seen him since that night.
Q. Since which night?
A. That night it occurred.
Q. What occurred?
A. That death happened.
Q. Where were you and Mr. Stinson that night? You say you saw Mr. Stinson that night.
A. Yes, sir.
Q. Where did you see him?
A. He was there at the meat room.
Q. Is the meat room in Refuge store?
A. Yes, sir.
Q. Where did you stay at that time, and what was your business?
A. Cutting meat.
Q. So you were in the store then, that evening?
A. Yes, sir.
Q. You saw Mr. Stinson at the meat room?
A. Yes, sir.
Q. Did you see the defendant, John Gibson, that evening?
25 A. Only what passed.
Q. Did you see John Gibson?
A. Yes, sir; I seen him that evening.
Q. Where did you see him?
A. He was in the store at the meat room.
Q. In Refuge store at the meat room?
A. Yes, sir.

Q. Did you hear John Gibson say anything?

A. Yes, sir.

Q. Tell the jury what he said.

A. He came in and asked Mr. Stinson for his time; and Mr. Stinson told him he would give him his time, but was going to dock him twenty cents, and he says, "What for?" and he says, "Because you didn't do as I said for you to do." Well, then, he went off and was gone about five minutes and was right back again and in about five minutes time and told him he wanted satisfaction about his time, and he told him he was going to give him satisfaction about his time, and was going to dock him twenty cents, and he turned off. I thought it was a joke, and he says, "The son of a bitch; if you dock me twenty cents me or you, one, will go to hell to-night," and that is all I know about it.

Q. When he turned off he said, "You son of a bitch, if you dock me twenty cents you or me, one, will go to hell to-night"?

A. Yes, sir; and that is what I know about it.

Q. When he turned around and made that remark, what did he do then, if you know?

A. Went on out the door; went out to the door.

Q. Did you see him any more that evening?

A. No, sir.

Q. Did you see him next day?

A. No, sir.

26 Q. How long was it after that before you saw him again?

A. When I came up here; I was summoned up here.

Q. Where was he when you saw him?

A. In here, in the court room.

Q. You did not see him any more on the place, and not until you were summoned at court?

A. No, sir.

Q. About how long was it from that evening when John said that he or Mr. Stinson one would go to hell that night before you saw him here?

A. I do not know how long it was, but I know I have not seen him until I came up here; I had not seen him.

Q. Was it a month, six months, a year, or two years?

A. I can't give no time about how long it was, although I can tell you I had not seen him until you summoned me up here.

Q. Do you know whether he was on the place after that or not?

A. No, sir.

Q. He was not there?

A. No, sir; not as I knows of.

Q. You keep pretty well posted as to who was on the place, did you not?

A. No, sir; only those I cut meat for; I cut meat for the whole plantation, but I could not tell them that I did not cut meat for.

Q. You cut for John Gibson when he was there?

A. Yes, sir; when he was there, but I do not know whether I cut for him on that night or not.

Q. You did not cut any meat for him after that time?

A. No, sir.

27 Cross-examination:

Q. What were your duties in that store at that time; what did you do there?

A. Most anything they would call on me to do; cut meat, make fires, feed horses—anything.

Q. You were a porter there in the store, then?

A. Yes, sir.

Q. Where are you working now?

A. Right there in the same place.

Q. How long had you been working there before that?

A. I had been working there about three or four years.

Q. How many people were in the store that night?

A. I do not know, sir.

Q. Couldn't you tell whether there were fifty or not?

A. I do not know, sir, how many there was in there.

Q. You know whether there was more than five, do you?

A. I can't tell you how many was in there when this thing occurred.

Q. Will you tell the jury you do not know whether there was more than five or not?

A. I never did say there was more than five, because I didn't know.

Q. Can't you tell that jury from the crowd of people that was there that night that you know there was more than five?

A. No, sir; I can't say there was more than five.

Q. Wasn't that Saturday night?

A. Yes, sir.

28 Q. Didn't people generally congregate on the plantation there in that store to get their rations and things?

A. I know they do, but I was not watching people that night; I was watching right at my business.

Q. Would you swear there was five people in this house?

A. I can swear there is more than five, but I do not know how many there was in the store.

Q. But with a large number of people in the store Saturday night like that you could not tell whether there was as many as five people in the store or not?

A. I do not know how many there was in there; I could not say.

Q. Who did you talk to about this case before you first came up here to testify?

A. Nobody.

Q. Didn't you tell anybody what you knew?

A. No, sir.

Q. How did they happen to get you up here as a witness in this case?

A. I do not know, sir; I reckon they knowed I was in there in the store.

Q. Did they summon everybody else that was in the store?

A. I do not know, sir.

Q. Now, you say that he turned off and told Mr. Stinson, "You son of a bitch, if you dock me twenty cents you or I one will go to hell to-night."

A. Yes, sir; I said so; that was the remark that was made before me.

Q. Those were *now* the exact words that he said to Mr. Stinson?

29 A. Yes, sir; that is what he said to him and turned around and walked on out.

Q. You have always said that thing all the trials in which you have given your testimony before, have you; that very same thing?

A. I can't tell nothing but them same words; that is all I know about it.

Q. Hav'n't you hatched up a little; hav'n't you added on since your first testimony in this case?

A. No, sir; I did not add on anything.

Q. The first time you testified in this case isn't this all that you said: That the defendant said to Mr. Stinson, that is, John Gibson said to Mr. Stinson, if he docked him either Mr. Stinson or he one would go to hell that night; isn't that all that you testified to on the first trial, the first time that you were on the stand?

A. That is all I know about it.

Q. Why didn't you tell them on that first occasion; why didn't you tell them the son of a bitch part?

A. I did tell them that.

Q. I am reading you here what Mr. Buck, the stenographer, took down as to what you said at the first trial of the case. Didn't you then repeat it afterwards and say——

A. Say which?

Q. John said that him or Mr. Stinson would go to hell to-night if he docked him twenty cents.

A. That is what I spoke in here; the same words I spoke.

Q. Why didn't you put the son of a bitch to it then, old man.

A. The son of a bitch was in there; I did put it in there.

Q. So then, old man, you did not put that on that time, for you said the first time simply that John said, "If you dock me twenty cents you or I one will go to hell to-night," and the third time you came here you added the son of a bitch on it; you must have forgotten the son of a bitch the first time.

A. I had it on first; it was on there first where it belonged.

Q. You swear to this jury that you did, upon the first trial of this case in which you testified, say just what you say now?

A. Just what I say now; I said it then and I say the same words yet.

Q. That he turned off and said, "You son of a bitch, if you dock me twenty cents, to-night you or I one will go to hell?"

A. Yes, sir; he said it, and that is all I know about it.

Q. You said you thought John was joking.

A. I did not know whether a joke or what, but he said the words and I thought the thing was over with when that was done. When they came and summoned me up here, I did not know what they summoned me here for.

Q. Mr. Stinson paid no attention to it?

A. He walked on out and he told him he did not want to have any trouble with him, and I told him that *that* at first, and he walked on out back to where Mr. Apples was.

Q. John did?

A. John went out first.

Q. Did Mr. Stinson hear him say this?

A. Yes, sir; he did hear him say it.

Q. What makes you know that he did hear him say it?

A. Because he was standing right there where I was.
31 Q. Where was Mr. Apple standing at that time?
A. Standing above there at the cheese stand, where they cut cheese.
Q. Did you weigh John's meat out to him that night?
A. No, sir; not as I know of; I do not know as I cut any meat for him that night.
Q. What were you doing at the time this conversation occurred?
A. Cutting meat.
Q. You were then at the scales, were you?
A. Yes, sir; right at the scales where the meat is.
Q. Do you know how many people were at or around the scales at the time?
A. No, sir; I know me, and Mr. Stinson, and John was there, but who all was in the store I could not tell.
Q. Wasn't Mr. Apple there?
A. I know he was there, but he was not at the scales, though.
Q. How far was he from the scales?
A. I do not know what distance it was; he was where they cut the cheese; I was down where they weighed meat; Mr. Stinson was standing there, and he had just weighed himself, and he was weighing meat, and Mr. Apple was setting it down, up there attending to the weights.
Q. You weighed the meat for them?
A. I put it on the scales and they weighed it.
Q. Who set it down?
A. Mr. Apple set it down.
Q. What time in the evening was this?
A. I do not know exactly what time in the evening it was; just like I said before, I do not know. I never had but one thing to do, and that was what they asked me to do, and I was not paying any atten-
32 tion to any time at all.

Redirect examination:

Q. Mr. Thomas asked you about your testimony on the first trial of the case; state whether you have testified all the time that John Gibson said, that if he was going to dock this twenty cents, John spoke and remarked, "You son of a bitch, if you do, me or you one will go to hell to-night."
(Objection as leading. Sustained. Question withdrawn.)

Capt. W. H. DRUMMOND, witness for State, sworn, testified as follows (white):

Q. Where did you live in January, 1892?
A. I lived at Refuge, Washington County, Miss.
Q. There is a diagram that Mr. Thomas, with the assistance of Mr. Apple, has drawn; you lived in that house there, did you not?
A. Yes, sir.
Q. What was your occupation there?
A. I was manager on the place.
Q. Do you recollect the night Mr. Stinson was killed?
A. Yes, sir.
Q. Where were you that night?

A. I was at home.

Q. What time did Stinson come home?

A. He came home a little before sundown, I think; it might have been about sundown.

Q. Where were you when he got home?

A. I was in the room on the east side.

Q. In the room marked "S" on diagram?

A. Yes, sir.

33 Q. In his room [Stinson's]?

A. Yes, sir.

Q. Well, tell what occurred when he came home.

A. When he first came home didn't anything occur; I was setting at the desk; it was his room we used as a bedroom, and we had a desk there where we kept our books and pay roll, and I was setting at the desk reading; it had been a bad evening and I had been sitting there all the evening pretty much, and he came in about sundown, I suppose, somewhere near it, and walked in there, and I asked him if he got through and he says, "Yes," and he took a chair and sat down by the fire, and I continued reading and he sat there for some time; I do not know how long he was there; but while he was sitting there this man John Gibson knocked at my window.

Q. This defendant?

A. Yes, sir; the window was right at my left, close to the desk.

Q. Say this represents the window on the diagram, and this dotted line the fence, where were you sitting? What part of the room?

A. The desk sat right there; I was right there.

Q. Where was Stinson?

A. Mr. Stinson was back here in front of the fireplace; he knocked at the window, and the sash worked on rollers, and I raised it up and asked him what he wanted, and he said he wanted to see Mr. Stinson about his time, and said his time was wrong, that Mr. Stinson had docked him.

Q. Did he say how much Mr. Stinson had docked him?

A. He did not say at that time, and he commenced telling me

34 then how it was. The time that he had been docked for had occurred, I think, probably on the first of the week, and I did not know anything about his being docked at all, and he commenced making an explanation about it, trying to explain it how it was; that there was other parties in the crowd and he had been docked and they had not. "Well," said I, "John, I have got nothing to do with that. Mr. Stinson knows what he is doing and I am not going to have anything to do with that," and Mr. Stinson raised up and stepped to the fireplace and remarked to John, he says, "I have done all I am going to do and I am not going to pay you another cent," and Gibson remarked then, he says, "You have got me to pay, and I am going to have my pay," or something to that effect, I would not be positive exactly what the remark was.

Q. You do not recollect the exact language, but words to that effect?

A. After I saw that he was getting a little impudent I pulled the window down and said, "Go along away from here," and I turned back to my reading, and Mr. Stinson walked out of the room without anything more being said; and after Mr. Stinson walked out of *of* the room I turned to attend

to the book, and opened the desk and got out the time book to see where the trouble had occurred, and I found on the day that he claimed he was docked there was nothing to show that he was not there except the time was not extended by twenty cents what it ought to have been; the time was there, but the amount was short twenty cents, and I did not go any further with it; after I saw that I turned the book down, and I do not suppose it was more than fifteen or twenty minutes I heard some firing out on the levee; I did not pay any attention to it; I heard the firing, two or three shots, and in a few minutes. There is a
35 hall way running between those rooms, and I hear a commotion in the room there and my daughter came running to the room——

THOMAS. Don't tell what they said.

SHIELDS. Did you find from them that Mr. Stinson had been shot? (Objection.)

Q. Did you find out from them what had occurred?

A. Yes, sir; I found out th're was trouble at the gate; I did not find out for certain what had occurred.

Q. What did you do?

A. I went across in my room to get a pistol to go out there and see if there was any trouble of that sort, and I went across into my room and I got a pistol and put it on, and went out to the front gate.

Q. What did you find out there?

A. I found Mr. Stinson dead; he was not dead exactly, but in a dying condition; he lived for a few minutes.

Q. Was that the gate near the levee; the large front gate?

A. Yes, sir.

Q. Was there any one there when you got there?

A. Yes, sir; there was a boy named Jack Monroe standing there when I got there.

Q. Was there anyone else?

A. No one else.

Q. No one else besides Jack Monroe?

A. No, sir.

Q. What was Jack Monroe doing?

A. Standing there by him; he wanted to make some little explanation.

Q. What did you do then?

A. By the time we had been there a few minutes they
36 began to gather there and there was several came up and I got this man, Jack Monroe, and a boy that staid arounds my yard, Josh Walker, and they took Mr. Stinson into his room.

Q. You and Jack Monroe and Josh Walker?

A. Took him in.

Q. When did he die?

A. He was dead when we laid him on the bed.

Q. Did he ever speak?

A. No, sir.

Q. Where was he shot?

A. He was shot in the right of his heart; I could not say it was in his heart.

Q. How many times was he shot?

A. Only shot once.

Q. Did he die after you got him in his room?

A. Yes, sir; he died; he only gasped a few breaths after he was laid on the bed.

Q. Are those clothes here that he had on?

A. I think they are.

(Objection by the defendant to the introduction of the clothes of deceased because the coat is not produced also with the vest and shirt. Overruled. Exception by defendant.)

THOMAS. Didn't he have on a coat that night?

A. Yes, sir; he had on a coat.

(Objection to the introduction of clothes. Overruled. Exception by defendant.)

SHIELDS. State to the jury whether or not there was any bullet hole in the coat at all.

A. None at all.

Q. No hole in the coat at all?

A. None at all.

Q. Where was the hole?

37 A. The hole was right in the region of the heart.

Q. In the vest?

A. Yes, sir.

Q. Take the vest and show the jury where the hole was.

A. This is the vest he had on; he had a suit like it; you can see the hole, the vest was buttoned, and the hole was open.

Q. You saw the hole there that night?

A. Yes, sir.

Q. And you state to the jury, positively, there was no hole in the coat at all?

A. No, sir.

Q. No marks on the coat at all?

A. No, sir; no sign of a mark on the coat.

Q. State to the jury whether or not there was any powder burns at that time on the clothes.

A. I could not see any; I examined them closely and I did not see any signs of powder burns at all.

Q. State to the jury whether or not a pistol was brought in that night.

A. It was.

Q. Was this the pistol?

A. Yes, sir; that is the pistol.

Q. Who brought that pistol in there?

(Objection. Overruled. Exception by defendant.)

A. Jack Monroe.

Q. When he brought the pistol in there what was done with the pistol?

(Objection. Overruled. Exception by defendant.)

A. He gave it to me and I carried it in the room and laid it on the bureau in the room.

Q. Whose pistol was that?

A. It was mine.

38 Q. Where had that pistol been?

A. I could not tell you where it had been that night; the last time I saw it it was in my dresser drawer in my room.

Q. Where is your dresser drawer?

A. It set to the left of the door coming into my room; set to the left of that; the secretary sets there and the dresser stood there.

Q. And the pistol was in that dresser?

A. Yes, sir.

Q. Not in that secretary?

A. No, sir; I did not keep it there, I kept it in the drawer that I kept my shirts in.

Q. How many loads were there in that pistol?

A. Two loads in it.

Q. How many empty chambers were there?

A. There was three.

Q. Did you examine the pistol?

A. Yes, sir.

Q. How many had the appearance of being recently fired?

(Objection. Overruled. Exception by defendant.)

A. Well, there was two; there was one that was different from the others.

Q. State what that condition was.

A. Two of them had the appearance of not being fired recently and one had the appearance of being recently fired.

Q. State what the condition was.

A. One was a dark color and the other was not.

Q. One had the appearance of being recently fired and the other had not?

A. One was smutty and the other showed there was a little corrosion about it.

39 Q. There was a little corrosion about the other two?

A. Yes, sir; I do not know that I would have noticed it if I had not been examining it closely.

Q. You examined it very closely?

A. I examined it very closely.

Cross-examination:

(The defendant moved the court to exclude the evidence about the pistol. Overruled. Exception by the defendant.

The motion to exclude is made because of want of identification.)

Q. You stated you were sitting by the window there and some one tapped at it, and you turned around and raised the window and found John Gibson there?

A. Yes, sir.

Q. On which side of that fence was it?

A. On this side next to the window; that is, the fence between the front and back yard.

Q. What was his first remark to you?

A. He came up to see Mr. Stinson about his time; that his time was wrong; that Mr. Stinson had docked him.

Q. You at that time were sitting between he and Mr. Stinson?

A. Yes, sir; Mr. Stinson was back of me in front of the fire, and I was sitting at the desk. There is a recess behind the jamb that the desk fit in, and I was sitting at that, and that put Mr. Stinson in front of the fire and to my rear.

Q. Did anything like a quarrel occur there between the two in your presence?

A. No, sir; nothing more than I have stated.

Q. This is your pistol here, is it?

40 A. Yes, sir.

Q. Do you know whether it was loaded or not when Mr. Stinson got it?

A. I do not know positively that it was. I seldom carried it only on special occasions, when I anticipated some trouble or wanted to have on something of that sort.

Q. This pistol was brought to you that night, I believe you said, by Jack Monroe?

A. Yes, sir.

Q. Jack Monroe is the man that assisted you in bringing Mr. Stinson into the house?

A. Yes, sir.

Q. How long was it after the killing before he brought it in?

A. Well, I could not state exactly how long it was. It must have been anywhere from a half an hour to an hour. I could not say positively how long it was.

Q. Did anyone assist you there in the examination of the pistol there that night?

A. Yes, sir; Mr. Love.

Q. Is it not a fact that you yourself was not satisfied, upon your examination, of the difference in the time that the barrels had been fired off until Mr. Love called your attention to it?

A. He called my attention to it.

Q. You were not of your own will, then, and your own examination perfectly satisfied?

A. Not enough to swear that I was.

Q. Not enough to declare that there was a difference?

A. It had that appearance.

Q. But Mr. Love examined it and said that it was so and you acquiesced in it?

A. Yes, sir; it looked that way to me after he called my attention to it.

41 Q. After he called your attention to it closely you agreed with him?

A. Yes, sir.

Q. Mr. Stinson owned a pistol, did he not?

A. Yes, sir.

Q. After the killing of Mr. Stinson, when was the next time that you saw his pistol?

A. Next morning.

Q. Where did you see it?

A. I saw it on the mantelpiece in his room.

Q. You, of your own knowledge, do not know how it came there, do you?

A. I do not, except what a boy told me.

Q. You simply went in his room next morning and saw his pistol lying there; do you not know who put it there?

A. The boy told me.

Q. You do not know of your own knowledge?

A. No, sir; I only got his word for it that he put it on there.

Q. You do not know how many pistols Mr. Stinson may have had on that night; whether he had on yours or both, or none, of your own knowledge?

A. No, I do not know; he may have had on mine and some others; I do not know what he had on.

Q. You said John Gibson told you that he wanted satisfaction about his pay, and that Mr. Stinson had docked him and not docked the others that had been working with him?

A. Had not docked them all.

Q. Mr. Stinson made no response to that except by simply telling him that he would not do anything more than he had done, and that he would not pay him any more?

A. That was about the statement that was made to him.

Q. This room of Mr. Stinson's was used by you for your settling room for you hands?

42 A. Yes, sir; most of our settling was done at the store, but there was frequently in some cases where they would come to me for a settlement, I settled it in the room, and we made out a pay roll there and it was sent into the store and it was settled there.

Q. What was the customary way for parties coming in to see you there for them to come in?

A. Well, they came in on both sides of the house.

Q. Came in both ways?

A. Yes, sir; they very frequently came there and set on the fence and waited, and frequently knowing they had to wait they would come around this other way. Here is a servant's room with a gallery on it here, a double house with a fireplace, and in cold weather they frequently went around there on the side there inside the gate and come around the fence.

Q. This was in January, was it not?

A. Yes, sir.

Q. So that it would not have been anything unusual for anyone to have gone that way and come in that way?

A. No, sir.

Q. When you shut down the window, did John leave?

A. Yes, sir.

Q. Did you notice anybody else out there with John at the time?

A. Yes, sir; there was two or three parties out there, but I could not state positively who they were except one. There was a boy out there; I saw him. Not having any business with him, I did not pay any attention to him; but there was a boy named Peter Braxton.

Q. Isn't that man, Peter Braxton, the only other man on the place that was docked just as John was docked?

A. I think it was all those, but I think he probably was.

Q. There was a number of them hauling, was there not?

A. Yes, sir.

Q. And out of that number John and Braxton were docked?

A. I think that was the only two to my best recollection.

Q. You saw him out there at the time?

A. Yes, sir.

Q. Did you see O'Neil out there at that time?

A. I may have seen him, but I could not swear I saw him. There was more than this man out there.

43 Q. When you went to the gate was Mr. Stinson down at the time?

A. Yes, sir.

Q. Please state how he was; what part of the gate?

A. He was just to the right of the big gate as you go into the yard, on the inside; there was a little path from the walk and he was right on the edge of that walk, just inside of the gate, on the right of the path; on the right of the gate coming to my house.

Q. You say there was some other parties out there when you got there?

A. There was no one with him except Jack Monroe; I asked him a few questions about it, and there was other parties came up in the meantime; I don't know how many or who they were.

Q. Who were the parties that assisted you in carrying Mr. Stinson in the house?

A. Jack Monroe and the boy that stayed around the yard, Josh Walker.

Q. You would not pretend to *to* state to the jury the exact time from the time that he left the window—that *that* John left the window—until the time of the shooting, would you, positively?

A. I could not state.

Q. It may have been three minutes, five minutes, or ten or fifteen minutes?

A. It was, I suppose, ten or fifteen minutes; I could not state positively.

Q. You could not say positively; not expecting anything of the kind, you would not be able to say how long it was?

A. No, sir.

Q. You said, I believe, that Mr. Love assisted you in this examination; I forget exactly whether you stated how long it was after that or not. How long after the killing was it before this examination of the pistol took place?

A. Well, it must have been between a half an hour or hour; it was after Mr. Love had got there when the pistol was examined; Mr. Love had come from his house where he lived, three miles, after the killing; he was telephoned immediately after the killing occurred, and he came over.

Q. Did you go out with Mr. Love that night to examine the
44 ground there?

A. I did not.

Q. Did you ever make an examination of the ground out there?

A. I went out next morning, after there had been a frost that night, and I could not tell anything about it next morning.

Q. Next morning you could not tell anything about it?

A. There was a great many tracks there, but I could not tell anything about the conditions there.

Q. What was the condition of the ground around about that gate, in front of that gate, that night?

A. It was muddy.

Q. Wasn't it very muddy?

A. Yes, sir; it was.

Q. Anybody would sink a couple or three inches deep?

A. Yes, sir; I suppose as muddy as any of this loam land that is traveled after a rain—very muddy directly after a rain—but soon drys off; but that night it was slushy and muddy.

Q. This was on Saturday and that was a public road out there?

A. Yes, sir.

Q. There was a good deal of travel on that road that day, was there not, upon that road?

A. Yes, sir; there is more travel usually on Saturday than any other day.

Q. The time this thing occurred it was about your supper time, was it not?

A. Yes, sir; it was about that time—about the time. I went to supper in a few minutes after; in a very short time after Mr. Stinson was brought in.

Q. I believe you stated that Mr. Stinson boarded with you and ate at your house and slept there?

A. Yes, sir.

Redirect examination:

Q. Mr. Thomas asked you about Mr. Stinson's pistol; you found it next morning on the mantelpiece in his room; state whether or not that pistol had been lost for some days before this killing.

A. I did not know that it was lost until after it was brought in.

Q. But this was the pistol Mr. Stinson had?

45 A. This was the pistol Mr. Stinson had that night, not his own.

Q. What became of John Gibson?

A. He left.

Q. Did you ever see him any more?

A. Not until I saw him in the court room.

Q. How long after that?

A. I think it was a year after.

Q. The last time you saw him was at the window?

A. Yes, sir.

Q. And did you not see him any more until a year afterwards?

A. Yes, sir.

Q. He left your place, did he?

A. Yes, sir.

Q. Did he leave that part of the country?

A. I suppose he did; he was not heard of.

Q. He never was heard of any more until he was brought back?

A. No, sir.

THOMAS. You state John Gibson left just after this.

A. Yes, sir.

Q. I will ask you, Capt. Drummond, if the friends of Mr. Stinson, on that night or on the day after, did not contemplate lynching him if they caught him?

A. Not to my knowledge; I do not know what would have been done if he had been caught. I could not tell you that; but there was no

organization of any committees or anything of the sort with reference to that, not about my premises or anywhere else that I know of.

Q. You did not know of it if anything of the sort happened?

A. I did not know it.

ELIZA JACK, witness for the State, sworn, testified as follows (colored):

Q. Where were you living at the time Mr. Stinson was killed?

A. I was out to Capt. Drummond's.

Q. Lived at Capt. Drummond's—what were you doing there?

A. Cooking.

Q. Do you recollect the night Mr. Stinson was killed?

A. Yes, sir.

Q. Well, just tell all that you saw that night in regard to the case.

A. I have done forgotten it now, it has been so long.

Q. Tell all that you can recollect.

A. I was out there at a window listening and I heard them
46 quarreling, and I did not know who it was, and I heard a remark; a man said "I wanted satisfaction."

Q. Where was that man, at the window?

A. Yes, sir.

Q. You heard him say he wanted satisfaction?

A. Yes, sir.

Q. What else occurred?

A. Mr. Stinson him to go to Capt. Drummond for it; and he asked Capt. Drummond; and Capt. Drummond told him he did not have anything to do with it; told Mr. Stinson he did not have anything to do with it at all, and he asked Mr. Stinson again, and Mr. Stinson told him he had done given him all the satisfaction he was going to give him, and if he did not go away from there he would kill him, the son of a bitch, and he told him to come ahead, then.

Q. John was standing at the window?

A. Yes, sir.

Q. You were out in the kitchen?

A. I was on the back gallery.

Q. You heard John demand satisfaction and Mr. Stinson said he had given him satisfaction, and he appealed to Mr. Drummond, and Mr. Drummond said that he never had anything to do with it; to go to Mr. Stinson?

A. Yes, sir.

Q. And Mr. Stinson told him to get away from the window?

A. Yes, sir.

Q. What was it he said to him?

A. He told him to get away from there, the son of a bitch, if he did not he would kill him.

Q. What did John say in return to that?

A. John said, "Come ahead."

Q. What else occurred then?

A. He came on around to the back gallery and I was standing there.

Q. John came around to the back gallery; you were standing at the back gallery; what did he say when he came around there?

A. He said, "Is Mr. Stinson in the house?" I told him yes; and he says, "I would like to see him;" and I said, "Who is that?" and he said, "This is John."

Q. Now what did he have when he said that, if anything?

A. It looked like it was a pistol.

Q. How did he have it?

A. He had it just so, in his hand [held near his bosom].

47 Q. He asked him where Mr. Stinson was; and it was after Mr. Stinson had told him to get away from the window, and he came back around by the gallery, and he asked you where Mr. Stinson was, and you said he was in the house, and he said he would like to see him; and he had his pistol in his hand?

A. Yes, sir.

Q. What did he do then?

A. He did not do anything. I went on in the kitchen and left him there.

Q. How long after that before you heard of the shooting?

A. I do not know, sir; I could not hardly tell you how long it was.

Q. A short while?

A. Yes, sir; I believe it was.

Q. A short while after that you heard the shooting?

A. Yes, sir.

Q. Were you there when they brought Mr. Stinson in?

A. Yes, sir.

Cross-examination:

Q. You say you were cooking at that time for Capt. Drummond?

A. Yes, sir.

Q. How long did you cook for Capt. Drummond after that?

A. I cooked for him a month.

Q. Where did you go then?

A. I came back to Hollywood?

Q. Who did you go to cook for then?

A. Mr. Love.

Q. Who have you been cooking for ever since?

A. Been cooking for Mr. Love.

Q. You say that this has been so long that you have almost forgot?

A. It is; they have hauled me about it so much I have done forgot what it is; I did not think of it any more until somebody asked me about it; I did not think nothing about it, and I cannot recollect all of it.

Q. You can't recollect all about it?

A. No, sir.

Q. You say Mr. Stinson told John when he was at the window the son of a bitch if he did not get away from there that he would kill him?

A. He did tell him so.

Q. You heard him tell him so?

A. Yes, sir; I did hear that.

Q. Did you see Mr. Stinson go out of the room?

48 A. Yes, sir.

Q. And he went right out of the room, did he?

A. Yes, sir; he went out of the room; I do not know where he went to then; it was dark in the hall, and I don't know whether he stepped in the hall or where he went; I did not see him any more.

Q. You say John came right around from that window and stopped on the back gallery?

A. Yes, sir; he was standing on the ground.

Q. Did you know John at that time?

A. No, sir.

Q. Had never seen him?

A. No, sir.

Q. And when you asked him, and when he told you who he was, he said, This is John?

A. Yes, sir.

Q. Did you know when he got around there whether it was the same man that had been at the window talking to Mr. Stinson or not?

A. No, sir; I did not.

Q. You do not know now, do you?

A. No, sir; I do not know whether it was the same one or not.

Q. You say it had been a long time since this thing happened, and you say that you saw something in his hand that looked like a pistol?

A. Yes, sir.

Q. I want you to be very particular about this thing. State whether or not you can say positively, on your oath, to that jury or not, whether he did have a pistol in his hand or not.

A. No, sir; I can't.

Q. He simply had his hand up this way and had something that looked like a pistol?

A. Yes, sir; he had his hand up this way (near his bosom).

Q. Has anybody attempted to persuade you in this matter about what you were to say?

A. No, sir.

Q. You have not had any talk about it?

A. No, sir; I have never bothered anybody about it and nobody asked me anything about it.

Q. Did you see Capt. Drummond in the room? Was he in the room at the time they had this talk?

A. Yes, sir; he was there reading.

Q. How long was it after this before you invited them in to supper?

A. I did not invite them in at all until they brought Mr. Stinson in and got through dressing him, because it were not done. After
49 everything was done with I asked them all in to supper, because supper was not ready then.

Redirect examination:

Q. I understand you to say that as soon as Mr. Stinson told John to get away from the window he came around there to the back of the house where you were standing on the gallery, back gallery?

A. Yes, sir.

W. D. LOVE, witness for the State, sworn, testified as follows (white):

Q. Where did you live in January, 1892?

A. On Hollywood.

Q. Were you acquainted with Mr. Stinson in his lifetime?
A. Yes, sir.
Q. Did you know the defendant, John Gibson, at that time?
A. No, sir.
Q. You did not know him?
A. No, sir.
Q. Do you remember the night upon which Mr. Stinson was killed?
A. Yes, sir.
Q. Where were you that night, Mr. Love?
A. I was at Hollywood.
Q. Did you remain at Hollywood all that night?
A. No, sir; as soon as I heard of it by telephone I got on my horse.
Q. As soon as you heard what by telephone?
A. That he was killed—that Mr. Stinson was killed; I got on my horse and went to Refuge at once.
Q. Where did you go when you got to Refuge?
A. The first place I went to, I went in Capt. Drummond's house.
Q. The diagram has been made here on the floor, and you say when you came from Hollywood you came to Capt. Drummond's house?
A. Yes, sir.
Q. What did you find when you got to Capt. Drummond's house?
A. I found Mr. Stinson lying in the bed, dead.
Q. Lying on the bed in Capt. Drummond's house, dead?
A. Yes, sir.
Q. State what you did, if anything.
50 A. The first thing then I asked for the pistol that had been found out there, that had been found in Mr. Stinson's hands or lying under him. The pistol was lying on the mantelpiece and I examined it to see what condition it was in.
(The defendant objects to the testimony in relation to the pistol and the introduction of the pistol.)
Q. State what you found with reference to that pistol.
A. You mean what condition the pistol was in? On one side of the pistol was mud
(Objection. Overruled. Exception by defendant.)
Q. State the condition of the pistol when you found it.
A. Capt. Drummond and I examined it together, and the pistol was muddy on one side and half-cocked; it was caught; you could not let it down or pull it back any further; you could not pull the hammer back.
Q. What seemed to prevent pulling the hammer one way or the other?
A. It seemed that it was caught in some way; it would not work. It was just that way and you could not pull it back or let it down. One side or the other was full of mud, and I took the cylinder out to examine it to see if it was loaded. I found three empty chambers and three loads; there had only been one fired, according to my judgment; any one that has been used to handling firearms can tell, as one of the barrels of the cylinder was black and the other was an ashy color, like they are now.
Q. But there was three empty cylinders, as I understand, and one of them indicated it had been recently fired.
A. Yes, sir.

Q. And the other two indicated they had not been recently fired, and they were of any ashy color?

A. Yes, sir.

Q. And the one that you said had been recently fired, in your opinion, was black?

A. Yes, sir.

Q. Would you know the pistol that you examined that night if you would see it again?

A. No, sir; I could not swear to it; .38 Colt's of that length
51 barrel is all exactly alike.

Q. What kind of pistol was it?

A. A .38 Colt's.

Q. After you examined the pistol, then, what did you do, if anything?

A. I took a lantern and went out and examined the grounds.

(The defendant moved to exclude all the testimony about any pistol. Overruled. Exception by the defendant.)

Q. State, please, to the jury what you did you got the lantern.

A. I went out and examined the grounds where they found him.

Q. This has been shown to be the gateposts; that is the southern gatepost and this the northern gatepost, and this is understood to be gate; which way does that gate open, outward or inward?

A. Inwardly.

Q. The hinges were on what post?

A. On the northern post.

Q. Now, where did you examine?

A. The gate was swung by hinges to that post and latched to this one, and I came out and examined the ground out there. I could not see any signs of any scuffle or nothing. I examined behind this gatepost here and found—there had been a heavy rain that morning, or some time during the day, I think that Saturday morning—and it showed there had been a man standing, or the foot-prints, right behind this gatepost, where it looked like a man had turned around there, or standing some little bit and made a double track. Those tracks when they left there they went, I reckon, stepping about three-and-a-half or four feet right out that way towards the levee until they got, I reckon, within fifteen feet of the levee, and then they came that way north until they struck the levee. The tracks leading from this gatepost led right out in that direction westwardly until they got there, and turned just in that direction north two steps and then turned to the right and came back and crossed his own track, and came right there, and there is where he fell.

Q. Right where?

52 A. To the southern gatepost where he had started from.

Q. What track was that—the track leading from the southern gatepost?

A. That looked like about a number five shoe.

Q. What was the size of the track leading from the northern gatepost and striking the levee?

A. It looked like it was about a number 7?

Q. Do you know what number shoe Mr. Stinson wore?

A. Yes, sir; he wore a 5.

Q. How far did that track extend westwardly from the southern gatepost?

A. It went out as far as this track did due west.

Q. How far?

A. I reckon about thirty feet.

Q. After leaving the southern gatepost and going this thirty feet it turned northwardly about two steps and went back eastwardly to the southern gatepost and recrossed itself?

A. Yes, sir.

Q. Was it the same footprint all through there?

A. Yes, sir; from the nearest I could get at it it looked like a man went out and turned and came back, and there was blood on the top plank of the fence where he had clasped it with his hands for support.

Q. There was blood on the fence by this gatepost there?

A. Yes, sir.

Q. Was that blood near this track here?

A. It was on the top plank—just the print of the hands.

Q. Was that outside of the large inclosure here or inside of it?

A. What—the blood?

Q. Yes; the blood and tracks.

A. Outside; right in the big road.

Q. Did I understand you to say there was tracks behind this northern post?

A. Like a man, whoever it was, had been standing there for some little bit and turned around; it looked like he had moved several times that way in turning.

Q. Were those tracks close together?

A. Yes, sir.

Q. That is the northern post there?

A. Yes, sir.

Q. Did that indicate that he had been standing there and changed position slightly?

A. Yes, sir.

Q. When they started from that northern gatepost those tracks led from the northern gatepost going westwardly. Were they made
53 by a man walking?

A. No, sir.

Q. State to the jury what the man was doing that made the tracks.

A. Looked like he was running; he was stepping about 3 and ½ or 4 feet.

Q. Did you find anything else there?

A. That was all that I could find there.

Q. You state that you had a lantern?

A. Yes, sir; I had a lantern and went out next morning.

Q. You made this examination that night?

A. Yes, sir.

Q. About what time?

A. It was, I reckon, about 8 o'clock; things frozen up that night.

Q. Well, now, was that a dark night *night*?

A. Yes, sir; a dark night. Well, I do not know; it was cloudy, but I do not remember whether the moon was shining or not.

Q. But it was a cloudy night?
A. Yes, sir.
Q. Did you make a careful inspection of all that ground that night?
A. Yes, sir.
Q. Who was with you?
A. Mr. W. C. Rutland.
Q. Where did Mr. Rutland live?
A. Mr. Rutland was then living on Swift Water.
Q. Now, did you see the clothes Mr. Stinson had on that night?
A. Yes, sir.
Q. Could you identify those clothes?
A. Yes, sir.
Q. See if you recognize anything there that he wore on that occasion?
(Objection. Overruled. Exception by defendant.)
A. This is the vest that he had on and that is the undershirt and that is the top shirt.
Q. That was the top shirt; do you know whether he had on a coat on that night or not?
A. Yes, sir; he had on a coat.
Q. What kind of coat?
A. Same goods as the vest.
Q. Did you examine the coat that night?
A. Yes, sir.
Q. Did you examine the vest that night?
A. Yes, sir.
Q. State whether or not the coat had a hole in it or not.
A. No, sir; it did not.
Q. Was there any powder burn either on the coat or vest?
A. Neither one.
Q. Did you examine them for marks or powder burns?
A. Yes, sir.
54 Q. Did you examine the coat for bullet holes?
A. Yes, sir.
Q. That coat was produced on trial at a former court, was it not?
A. Yes, sir.
Q. Do you know where it is now?
A. Yes, sir.
Q. Where is it?
A. At his father's.
(Objection. Overruled. Exception by defendant.)
Q. Do you know whether it was here or not?
A. I thought it was in the bundle; this clothing was sent to me on the last trial; they came in the evening of the day of the trial and I had never opened the clothing; it got here too late for the trial and I never opened them myself; my wife has opened them, I see, and put some camphor in them to keep the moths out of them.
Q. The coat was introduced on the first trial, as I understand?
A. Yes, sir; it was.
(Objection. Overruled. Exception by defendant.)
Q. In what county and State did this killing occur?
A. Washington County, State of Mississippi.

(The defendant moved to exclude all the evidence in regard to the clothes and pistol. Overruled. Exception by defendant.)

Q. Those tracks going north, you tracked them up to where it struck the levee?

A. No, sir; not all the way. I tracked it about, after it turned, about sixty yards; I reckon, going at that angle, I should reckon, it would have went probably one hundred or one hundred and twenty-five.

Q. You did not follow it any further, or did you try to follow the track any further or not?

A. No, sir; I did not. It got on same Bermuda grass and I could not see the track.

Q. Was that the reason you did not follow it any further?

A. Yes, sir; I probably would have followed it further if I could have seen it.

Q. What was about the distance of those two tracks—I mean the tracks going from the northern post, going west, and the tracks from the southern post going west—from each other?

A. Where they were those tracks were never closer, I reckon,
55 than eight or nine feet apart, but when he turned north I guess they came within five or six feet.

Q. When the tracks of the southern post turned north they came within five or six feet of the tracks going from the northern post going west?

(No answer.)

Cross-examination:

Q. You live about five miles from the scene of the killing?

A. Yes, sir; by one road; the road that is generally trailed about five; there is another one that you can go about four and a half.

Q. What time that night did you hear of the killing?

A. I did not look at a timepiece, but I should judge, though, it was about, I reckon, 7 o'clock.

Q. What did you immediately do after hearing?

A. I jumped on my horse immediately.

Q. When you got there you found Mr. Stinson was dead in his bed?

A. Yes, sir; and carried in his house.

Q. Had he been dressed?

A. They had not quite finished him.

Q. They had taken off his clothing?

A. They were taking them off when I got there.

Q. How long was it after you arrived at Capt. Drummond's house before you examined this pistol? Did you examine the pistol before you went out to examine the tracks?

A. These parties they were dressing him; I did not help to dress him at all; I examined the pistol; and Mr. Rutland and I went out in fifteen or twenty minutes after we got there.

Q. You do not know of your own knowledge whether this was the pistol Mr. Stinson had or not, do you, of your own knowledge?

A. No, sir; not of my own knowledge, I was only told it was brought in with him.

Q. You do not know that it was brought in with him?

A. No, sir; I was not there when he was brought in.

Q. You do not know anything about the pistol at all except what was told you?

A. No, sir.

56 (The court held the only portion of the testimony of this witness in regard to the pistol that was competent was his examination of the pistol.)

A. I would not take that to be the pistol anyway. I have a pretty good memory on firearms, and that don't look like the one.

Q. The pistol that you did examine there that night convinced you there had been only one barrel recently fired, and that the other had been fired more recently.

A. Yes, sir; I did not know how long, but it takes them several days or weeks. You ought to know. Anyone that is used to handling firearms when they see a pistol that has been long emptied will know it takes some time to corrode and have that ashy color to it.

Q. What time, now, did you make the examination about the tracks—how long afterwards?

A. About 8 o'clock, I should judge.

Q. Mr. Rutland went with you, and you carried a lantern.

A. Yes, sir.

Q. I believe you state you examined behind this post here north, and that the man who apparently stood behind there—the tracks went out how many feet?

A. About thirty feet.

Q. Within fifteen feet of the levee?

A. Yes, sir; about that as near as I can come at it.

Q. And then they turned in a northwesterly direction.

A. Yes, sir.

Q. Now they struck the levee here; now how far is it from here from where he diverges northward after coming out?

A. Fifty or sixty yards, I reckon.

Q. After going out thirty feet and diverging northward how far would it take the same tracks to reach the levee?

A. I reckon the angle they were going it would have taken 120 or 125 yards to get to the levee at the angle they were going; they were going almost straight up the road.

Q. The track from the southern post came back on a parallel line from the northern track as far as the northern track went with it.

A. Yes, sir.

Q. And then it apparently took two steps northward drawing two steps nearer the man north of him?

A. Yes, sir.

57 Q. If they started eight feet apart from each other, after going out to where he made the two steps northward, after making the two steps northward, that, then, brought him within two or three feet of the other man?

Q. How far did he step?

A. These steps, I reckon, were about two feet apart.

Q. So that he would have stepped—he apparently stepped—four feet, and then they would have been within four feet of each other.

A. Yes, sir; about four or five feet; somewhere along there.

Q. I believe you stated that the tracks on the northern side showed that the party who made them was running?

A. Yes, sir; both parties were running, going west.

Q. You have stated, I believe, that you tracked this man from directly behind this post.

A. Yes, sir.

Q. Southerly?

A. No; the track he came through the gate, it was a little northward from where he started, probably a foot north of that post, of the southern post.

Q. And you tracked this man from the northern post, from directly behind the northern post; did you examine this ground next morning?

Q. About what time?

A. Between daylight and sunup.

Q. What was the condition of the ground next morning?

A. Frozen.

Q. When you went back there next morning did you resurvey the ground and find out that it confirmed your supposition or ideas of the night before?

A. Yes, sir.

Q. The direction of the tracks and the distance and everything complete?

A. Yes, sir.

Q. Were there not a number of tracks out there in that road; a very large number of tracks?

A. Well, yes, sir; right along by the fence there was a path leading right along here, and the walking muddy weather is either down close up here by the fence here or on top of the levee; if it is dry, they generally walk down next to the fence; and if it is muddy and wet, they generally go on top of the levee.

58 Q. Is it not a fact the tracks were so numerous on the west side of both these posts that no tracks could be identified for five or six feet out west from either post?

A. No, sir; they were not that numerous.

Q. You state to the jury then these tracks led out from each post so that you could identify them?

A. Yes, sir.

Q. Now, Mr. Love, I am afflicted with a defective memory as to names; I can't remember names ten minutes; did you ever discover in figuring or in thinking about distances and directions that your memory was possibly defective in the recollection; I mean now of distances and directions?

A. I have not that defect.

Q. You are positive that you make these statements now just as you made it the first time you were on the stand?

A. As near as I can come at it; I do not think there is much difference, sir; sometimes a man asks a man a different question.

Q. And you get them mixed up?

A. They go a little further.

Q. Now, I want to get at this: Your recollection of distances and directions is so good that you can't be mistaken in saying that the first time that you testified here that your testimony will agree in the main with this?

A. Yes, sir; my first testimony will agree as those lines are laid off there [on the diagram].

Q. I will ask you if the first time you were on this stand if you did not testify just as you have testified now, that this man just started from behind this post, the northern post, the track that started from behind the northern post, did not go directly westward for sixty feet?

A. No, sir; I said the public road was about sixty feet, I think.

Q. Didn't you go about sixty feet and didn't you say that after going sixty feet that the steps then went directly down the road in that direction fifty yards and you lost them on the levee?

A. No, sir; I do not think I said it.

59 Q. You did not say that the northern steps went off directly sixty feet and turned directly down the road fifty yards.

A. Not to my recollection.

Q. I will ask you as to this southern man, if you did not state on your first trial that you were interrogated here, if you did not state, while the northern man went out sixty feet west that the southern man only went out twenty feet and turned directly around and went back to the gate and put his bloody hands upon the gate?

A. No, sir; I do not think I stated that.

Q. You now state that the man from the southern post here went out as far westward as the man who went from the northern post?

A. There might have been a little difference; I did not measure it exactly, but they were very near together, very near the same distance; one might have been a little difference in the other.

Q. The southern post went two steps northward, and then turned around and crossed his own steps and went to the post; that is correct, is it?

A. Yes, sir.

Q. Do you know of your own knowledge the coat that he wore that night, or do you know from what they told you?

A. Well, sir; there was a good deal of mud on the coat and I helped clean it off myself.

Q. But, did you know of your own knowledge that he had ever had on that coat except from signs?

A. No, sir; I do not know; they had that coat off when I got there.

COURT. Did he have this vest on him?

A. No, sir; he did not have the vest on, but they were all lying on the chair; they had taken them off.

THOMAS. All of the clothes had been taken off of him?

A. No, sir; not all of them.

Q. Do you remember what was on him at the time?

A. No, sir; as soon as I saw that he was dead I never paid much attention.

Q. To what was on him?

A. No, sir; in regard to clothing.

60 Q. You went in and out at that gate several times. I will ask you, in going in this gate or going out of it wasn't there a little mud hole, and you would have to come here and swing around this place?

A. It was not a little one; it was large as the gate, I reckon. In opening this gate if you turned it loose the gate would naturally swing itself wide open, and you would have to go back and get it and hold to it to shut it as you went through; therefore you would have to hold it and swing around that gatepost. It was dry on each side of the gatepost, and you could easily hold to the gate and swing around that without getting into the mud at all, but if you turned it loose you could not reach it; it would swing away off yonder eight or ten feet from you.

Q. It would swing around to this sidewalk which runs this way?

A. The sidewalk stopped forty or fifty yards south of the gate. It was pretty high land right along here, and the sidewalk stopped there and went from there on to the store.

Q. He would swing himself around to high ground?

A. Where it was not muddy.

Q. You were formerly from Madison County?

A. Yes, sir.

Q. Mr. Stinson was from Madison County, as well as yourself?

A. Yes, sir.

Q. Were you an intimate friend of his?

A. Well, I can't say an intimate friend. I never did know much about him as a boy; he was nothing but a boy when he was killed. I never lived in his neighborhood in Madison; I knew of him as being a good, steady boy, and recommended him for this position.

Q. You have taken, as you had a right to do, a great deal of interest in this prosecution?

A. As much as I would of anybody else in my neighborhood; I would take the same interest in anybody else.

But you have been very dilligent in this case, have you not, in hunting up testimony and the evidence?

A. I have not hunted up any, sir.

Q. I do not mean that in an offensive sense; I mean you

61 been dilligent?

A. I have not hunted up and talked to anybody about it; I only examined the ground as anybody ought to have done.

Q. I say as you have a right to do?

A. I would have shown equally as much interest in a negro being killed on my place.

Q. It is in evidence here that Gibson ran off. I just ask you now candidly if it would not have been dangerous for him to have stayed in the neighborhood under the excitement and everything of the sort at that time?

A. From the evidence and the laws of our country I reckon it is.

Q. It would have been dangerous for him to have remained here?

A. Yes, sir; from the evidence that is shown of his guilt and the laws of this country, I think it is dangerous for anybody.

Q. I just ask you if next morning, if it would not have been dangerous, under the supposition in the neighborhood, and the cry as to its possibly being Gibson, if it would not have been safer and necessary to his safety for him to leave that neighborhood just at that time?

A. You can be your own judge.

Q. I am asking you now. I want a candid answer.

A. I do not know, sir; I knew nothing of the circumstances.

Q. But in the light of after developments there, you heard his friends talking. I am not asking what they said, but from the information you gained from his friends and the deep interest and excitement which was brought about there, don't you believe it would have been unsafe?

A. I believe in the law taking its course.

Q. I am asking you if you do not believe.

A. If I had believed or understood otherwise I would have said I believe we would have hung the negro.

Q. You do not believe, if he had remained, there would have been any attempt made to hang him?

A. No, sir; I believe the men were as cool headed that night as anybody in the country.

62 Q. There would have been no effort to hang him there, or any attempt if he was acquitted?

A. No, sir; there never have been any.

Q. I am just trying to explain, if I can, his leaving.

A. I think the men of that neighborhood as considerate to-day on that case as they were then.

Redirect examination:

Q. There was no effort made that night, as far as you know, to harm the defendant, was there?

A. None whatever, sir.

Q. Do you know whether any was made next morning to harm him?

A. No, sir.

Q. As I understood you, you stated in going out of this gate—that is the gate entering into the main yard of Drummond's premises—that you got here and you unlatched the gate and swung yourself around there and held the gate and then latched it?

A. Yes, sir.

Q. You stated these tracks went out this way; you have explained that, though.

Mr. DAN MCLEAN, witness for the State, sworn, testified as follows (white):

Q. At the time the defendant, John Gibson, was arrested what position, if any, did you occupy?

A. I was deputy sheriff of this county.

Q. Deputy sheriff of Washington County?

A. Yes, sir.

Q. Where was John Gibson arrested, do you know?

A. Yes, sir; he was arrested in Kansas City, Kansas.

Q. Do you know how long after Stinson was killed that this arrest was made there?

A. I think Stinson was killed in Jan. and this was the following November, I think.

Q. Did you see the defendant, John Gibson, in Kansas City, Kansas?

A. I did.

Q. Whereabouts in Kansas City, Kansas?
A. In jail in Kansas City.
Q. Did you bring him back?
A. I did, under a requisition.

63 BOB REDRICK, witness for State, sworn, testified as follows (colored):

Q. Do you remember the night Mr. Stinson was killed at Refuge store?
A. I do, sir.
Q. Where were you going that night?
A. Down to Refuge store.
Q. Where were you living at that time?
A. On Warfield plantation.
Q. Is the Warfield plantation south or north of Refuge store?
A. North.
Q. Then, in which direction were you going when you were going to Refuge store from the Warfield plantation; which direction were you going?
A. Going down the road.
Q. North or south?
A. Going south.
Q. Then the direction you were going to Refuge store caused you to pass Drummond's house before you got to the store?
A. Yes, sir.
Q. Did you hear any shooting that night?
A. I did.
Q. Where were you at the time you heard the shooting; were you north of Capt. Drummond's house or south of it?
A. I was up above it, north.
Q. This side of it?
A. Yes, sir.
Q. Did you see anybody after the shooting?
A. I saw several people; I met several people, but after the shooting I met another one; I did not meet him; I saw somebody on the levee; I did not pay any attention to who it was or anything, but he was striding very lively.
Q. That was after the shooting?
A. Yes, sir; that was after I heard the shooting.
Q. After you heard the shooting you saw a man on the levee striding very lively; which way was he going, towards the Refuge store, or going towards Greenville or Warfield?
A. Coming up the levee.
Q. North?
A. And I was going down.

Cross-examination:

64 Q. How far was it from the front gate to Capt. Drummond's that you saw this man that was striding very lively?
A. A pretty good distance.
Q. How far is a good distance?

A. A little on this side of the blacksmith shop, I reckon it is about three-quarters of a mile; I do not know anything about it.

Q. From the big gate?

A. From the big gate; coming from the gate I was a little up above the big gate; the gate sets above Capt. Drummond's yard gate and goes into the lot of the yard.

Q. What time was this, at night?

A. Early part of the night, I think.

Q. How far were you from the gate when you heard this shooting?

A. About a half a mile I guess, or quarter; right good distance.

Q. So that when you met this man, you met him about three-quarters of a mile above the gate?

A. A good distance above the gate.

Q. When you heard the firing you were then a half a mile of the gate?

A. I was a good distance; I do not know how far it was; I could not say; it may be a half a mile or quarter; I was a good distance above the gate when I saw this man on the levee.

Q. When you heard the firing about what distance were you?

A. It was near about the same distance up above there; I was above the blacksmith shop when I first heard the shot, and the blacksmith shop sits, I reckon, about as far from Capt. Drummond's house as from here down to the first depot there—the I. C. depot (250 yards).

Q. You were then about 250 yards when you heard the firing?

A. I suppose about that, sir; I was not paying no attention to the man, I met so many people; it was a public place; I was riding, going to the store.

Q. You met other people besides him?

A. I met several people.

Q. In the way that you met him?

A. Yes, sir.

Q. It was nothing uncommon?

A. I do not know whether I met him or not; I do not know
65 who I met; I just saw them going; it was snowy weather and people were walking fast, you know, in cold weather.

Q. He was not walking uncommonly fast for a man in cold weather?

A. Striding very lively.

Q. That was Saturday night?

A. I think it was on a Saturday night.

Q. That was a public road, and a good many people traveling on that Saturday evening?

A. Directly after Christmas; everybody was livel' then; I was going down to the barroom for whiskey myself.

Redirect examination:

Q. You saw this man making this lively stride after the firing, did you?

A. Yes, sir; it was after the firing.

Q. Where were you when the firing occurred, with reference to the blacksmith shop?

A. I was up above the blacksmith shop. The first shot I heard I had not got to the shop, and the next shot I heard I was right opposite of the shop.

Q. Then you saw the man after these shots?

A. Yes, sir.

Capt. DRUMMOND, W. H., recalled by the State:

Q. Had this man, Jack Monroe, been settled with that night?

A. No, sir.

Q. What was the custom of Mr. Stinson in settling with the hands?

(Objection. Sustained.)

Q. Where was it Mr. Stinson settled with the hands?

A. He made out a pay roll and carried it to the store to settle.

Q. The hands were to be settled with at the store?

A. Yes, sir.

(Objection by defendant. Overruled. Exception by defendant.)

Q. And this man, Jack Monroe, had not been settled with that night?

A. No, sir.

Cross-examination:

Q. Do you know of your own knowledge that Jack Monroe—
66 not that anybody told you—do you know of your own knowledge whether Jack Monroe had been settled with that night or not?

A. I know that he had not. I can explain to you why he had not, if you wish to know it.

Q. I do not want it if it was told you by somebody.

A. No, sir; I know of my own knowledge that he was not settled with.

SHIELDS. Do you know whether or not he had come there for the purpose of being settled with?

A. I do not. I know that he had not been settled with.

(State rested.

It was admitted Mr. Apple would swear that he had sold John Gibson shoes, and that he wore a number 7 or 8 shoe.

The pistol and clothes introduced in evidence by the State.

Objection. Overruled. Exception by defendant.)

The following evidence on behalf of the defendant was introduced:

(The defendant here read the agreed statement of Miss Annie Drummond.)

STATE OF MISSISSIPPI
vs. } No. 4076.
JOHN GIBSON.

It is agreed by all counsel on both sides that if Miss Annie Drummond were present she would testify under oath to the following facts, to wit: On the night up' which Robt. Stinson was killed, the 9th January, 1892, and a short time before the killing, Robt. Stinson came into the room of her father, Capt. W. H. Drummond, where she and
67 her sister Sallie were sitting, and asked for her father's pistol, and that her sister went to the dresser drawer, got her father's pistol,

and gave it to him. He at once left the room. A short time after this, she does not know how long, she heard firing in front of the house, and this is all she knows about the case.

WALTON SHIELDS, *Dist. Atty.*
G. W. THOMAS, *Atty. for Def.*

Filed January 11th, '95.

WM. K. GILDART, *Clk.*

It was also admitted that Jack Monroe was summoned by both the State and the defendant, and was on the stand and testified on the first trial, and has not been found since that trial.

Mr. W. J. BUCK, sworn, testified as follows for defendant (white):

Q. Will you please examine these papers which purport to be a copy of the evidence taken down by you on the trial of this case in Jan., 1893, and filed Feb. 23rd, 1893? State to the jury if this is your stenographic report of the evidence in that trial.

A. Yes, sir.

Q. Is this report a true and correct one?

A. It is.

Q. I will read to the jury from this report that portion of his testimony which relates to the tracks there, about which I examined Mr. Love.

A. There were tracks leading out, prints made in the mud, and the prints went to show that a man had been standing right behind that right-hand gatepost.

Q. You mean that there was footprints behind the right-hand gatepost on the big road?

A. Yes, sir; and the gate opened out; these tracks left the
68 right hand gatepost running straight out across the road, and I think they were stepping about three and a half or four feet, and the steps run out from the left-hand gate about the middle of the road, and there he made a stop and turned around and came back to the gate. There is where he fell.

Q. You mean the tracks leading from the house to the gate?

A. No, sir; there were no tracks from the house to the gate. It was a walk from the house to the gate, but after opening the gate there—it seems like after opening the gate he went in and run to the middle way of the road. The tracks appear to be those of a running man to the middle of the road.

Tell the jury about the other tracks.

A. The tracks after leaving the gatepost run straight out, very near the levee, which levee, I reckon, is about sixty feet, and then went straight down the road.

Q. You could see the tracks?

A. I tracked them until they went up on top of the levee.

Q. How far down the road?

A. I reckon they went fifty yards down the road before they got on top of the levee.

Q. About how far down the road?

A. He went up the road in this direction.

Q. Suppose the store be here. He went up in this direction; he went up to the right of the house. Were those tracks that went up to the right of the house the same tracks that were made or that were behind the right-hand gatepost?

A. Yes, sir.

Q. You say they went up to the middle of the road?

A. Yes, sir; right straight down into the middle of the road, or a little over halfway of the road, and then turned and went that way.

Q. These tracks that led from the front gate?

A. From the left-hand gatepost, where it opened.

Q. Where did they go to?

A. They went out about as far as from here to the far end of the jury and came straight back to the gatepost.

Q. Were those different tracks from the others?

69 A. Yes, sir.

Q. Where was it they were found?

A. Right at the gate.

Q. What was the distance the tracks went from the left-hand gate before they turned back—how many feet?

A. I reckon twenty feet, and the other track went a little further than that; they went fully, I reckon, thirty or forty feet and then turned directly up the road.

Q. Did the tracks never show that they were any closer than eight feet together—they were never closer than eight feet together, you are positive of that?

A. Yes, sir.

Q. Now, didn't I understand you to say these tracks leading from the left-hand gatepost indicated that the man who made them was running?

A. Yes, sir; I reckon he was running; he was stepping about three and a half or four feet.

Q. You do not mean that the man from the left-hand gatepost was running—you mean the man from the right?

A. They both ran.

Q. Did the gate open into the road or into the lane?

A. Whether swinging into the lane or into the road; it swung into the lane. There was a pretty bad mud hole there that made people in passing there—you would have to hold on to the gate and swing around.

Q. I will read now to the jury from the testimony taken down at the same time by Mr. Buck the testimony of Dan Scott as to what took place between the deceased and the defendant here,

Q. He told Gibson he docked him twenty cents?

A. Yes, sir; he went out and then came back again and said he wanted his time again.

Q. Who went out—John Gibson?

A. Yes, sir; like as to he was going out to the door, and came back and told him he wanted satisfaction about his time, and he told him he had given him satisfaction about his time, and when he said he was going to dock him twenty cents he told him again, and then John

70 Gibson said to Mr. Stinson if he docked him either he (Mr. Stinson) or he would go to hell that night.

Q. What was it exactly that he said; what did John state?

John said that him or Mr. Stinson, one, would go to hell to-night if he docked him twenty cents; he said one of them would. That is all I know about it.

(Defendant rested.

This is all the testimony in the case.)

I, W. J. Buck, official stenographer of the fourth circuit court, district of Mississippi, hereby certify the foregoing pages do contain a true copy of all the evidence introduced on the trial of the case of State vs. John Gibson for murder, trial at the January, 1895 (criminal), term of the circuit court of Washington County, Miss.

Signed Feb'y 5th, 1895.

W. J. Buck.

Filed Feb'ry 8th; 1895.

Wm. K. Gildart, *Clk.*,
By Chas. F. Johnson, *D. C.*

Defendant objected to this question by the State to witness Drummond: "Are those clothes here that he had on?" because all the clothes are not here, the coat being absent. The court overruled the objection, and defendant then and there excepted. The shirt and vest were introduced in evidence, and to the action of the court in allowing them to be thus introduced defendant then and there excepted.

The defendant objected to the following questions by the State to said Drummond: "Who brought that pistol in there?" "When he brought the pistol in there, what was done with it?"

71 The court overruled said objections, and defendant then and there excepted to ruling of the court.

The defendant moved the court to exclude the evidence about the pistol for want of identification.

The court overruled the motion, to which ruling of the court the defendant then and there excepted.

The defendant moved to exclude all the testimony of Witness Love in regard to the pistol as incompetent.

The court ruled that the only portion of *of* this testimony of Love in regard to the pistol that was competent was his statement in regard to examining it and his statement as the condition of said pistol, and excluded his other statements in regard to the pistol.

Defendant then and there excepted.

Defendant objected to questions to said witness in regard to the clothes of the deceased, the court overruled the objection, and to the ruling of the court defendant then and there excepted.

Order.

State of Mississippi
vs.
John Gibson. } No. 4076.

This cause coming on to be heard, the defendant being present in open court, the State and defendant both announced themselves ready for trial, and the evidence was introduced on the part of the State and also on the part of the defendant, and the court adjourned until to-morrow morning

at ten (10) o'clock, and the prisoner was remanded to jail, and the jury was placed in charge of their sworn bailiffs. (January 11th, 1895.)

72 The court gave the following instructions asked by the State:

No. 1. The court instructs the jury that, if they believe from the evidence beyond a reasonable doubt that the defendant, armed with a deadly weapon, went to Capt. Drummond's house, and when he got there he went to Stinson's window and demanded of him the money he claimed, and they, Stinson and Drummond, refused to allow it to him and Stinson said, "Get away from the window, or I'll kill you," or words to that effect, and Gibson replied, "Come ahead," intending to engage in a mortal combat with deceased and to kill him, and Stinson went into another room and got Drummond's pistol and Gibson went out to the gate and waited for him, for the purpose of engaging in a mortal combat with deceased and killing him, and there they engaged in a mortal combat, in which Gibson shot and killed Stinson, he is guilty of murder, even though Stinson shot at him first and more than once.

Given.

W. K. GILDART, *Clerk.*

No. 2. The court instructs the jury that, if they believe from the evidence beyond a reasonable doubt that the defendant went to Capt. Drummond's house, armed with a deadly weapon, and with the intention of using it and killing Stinson in case Stinson still persisted in docking him twenty cents from his time, and that when he got there Stinson and Drummond refused to allow him the twenty cents, and Stinson told him to get away from the window, and Stinson went out of that room into Capt.

73 Drummond's room and got Drummond's pistol, and Gibson, with his pistol in his hand, went on to the front gate in order to have a difficulty with Stinson, and to kill him, and when he got to the gate Stinson came out afterwards, and they had a difficulty at the gate in which Gibson shot and killed Stinson, then he is guilty of murder, even though Stinson had a pistol and shot him, Gibson, during the difficulty, and even though Stinson fired the first shot.

Given.

W. K. GILDART, *Clerk.*

No. 3. The court instructs the jury that if they find the defendant guilty as charged, the effect of that verdict will be that the defendant will be hung; but if the jury believe from the evidence beyond a reasonable doubt that the defendant is guilty as charged, the jury may find the defendant guilty as charged and fix his punishment at imprisonment for life in the penitentiary; but if the jury agree that the defendant is guilty as charged, but disagree as to the penalty, the jury must find the defendant guilty as charged.

Given.

W. K. GILDART, *Clerk.*

No. 4. The law presumes the accused to be innocent of the crime charged until his guilt is proven beyond a reasonable doubt; but if the jury believe from the evidence beyond a reasonable doubt that the accused killed the deceased with a deadly weapon, then the general presumption of innocence yields to the specific proof of such homicide, and

the law infers that the killing was malicious and therefore murder, because, as a rule, it is unlawful to kill a human being, and is murder if not something else; and as special circumstances only will vary
74 the legal view of homicide so as to relieve it from the character of murder, it is inferred or presumed to be murder from the fact of killing unexplained, but if the attendant circumstances are shown in evidence, whether on the part of the State or the accused, the character of the killing is to be determined by considering them, and it is then not a matter of presumption which operates in the absence of explanatory evidence, but for determination from the circumstances shown in evidence.

Given.

W. K. GILDART, *Clerk.*

No. 5. Every homicide is presumed in law to be malicious and therefore murder; and when the killing has been proven beyond a reasonable doubt, the law will presume the malice requisite to murder, and it then devolves on the defendant to show some circumstances of alleviation, justification, or excuse, unless there arise out of the evidence which has been adduced against him on the part of the State, but it devolves on the State to prove that the defendant is guilty as charged beyond a reasonable doubt.

Given.

W. K. GILDART, *Clerk.*

To the action of the court in granting said instructions for the State defendant then and there excepted.

The court gave the following instructions asked by the defendant:

No. 1. The court instructs the jury that under their oaths they are to try the accused by the testimony as detailed by the witnesses before them, and the law as given by the instructions, and that the jury have
75 no right to consider anything else in arriving at their verdict but the evidence so detailed by said witnesses and the law so given by the court; and it is the sworn duty of the jury to try the defendant under the same considerations as if a white man were on trial for killing a colored man or for the killing of any other human being, and should not be in way prejudiced against the defendant on account of his being charged with killing a white man.

Given.

W. K. GILDART, *Clerk,*
By C. F. JOHNSON, *D. C.*

No. 2. Proof of malice does not tend to proof of the killing, and can not be considered by the jury as proof of the killing, and proof of malice can be considered by the jury to show motive only.

Given.

W. K. GILDART, *Clerk,*
By C. F. JOHNSON, *D. C.*

No. 3. The court instructs the jury that they are the sole judges of the credibility of the witnesses, and that they may believe or disbelieve any witness, in whole or part, and may take into consideration *or* motive that prompts such witness to testify as to any fact or circumstance in the case.

Given.

W. K. GILDART, *Clerk,*
By C. F. JOHNSON, *D. C.*

No. 4. The law presumes the innocence of the defendant, and it is the duty of the jury, if they can reasonably do so, to reconcile all the facts and circumstances of the case with that presumption; and if upon the whole case the jury entertain a reasonable doubt of the defendant being proven to be guilty he is entitled to the benefit of that doubt, and they should acquit.

Given.

W. K. GILDART, *Clerk*,
By C. F. JOHNSON, *D. C.*

76 No. 5. The law has certain humane rules laid down in relation to circumstantial evidence, one of which is, if there be a single circumstance proved which is the necessary links in the chain of evidence or transaction that is inconsistent with the guilt of the accused, no matter how suspicious the other circumstances may be, the defendant is entitled to an acquittal; and if the jury in this case should find a single circumstance proved which is inconsistent with the guilt of the defendant they should acquit.

Given.

W. K. GILDRART, *Clerk*,
By C. F. JOHNSON, *D. C.*

No. 6. While circumstantial evidence in its nature is capable of producing the highest degree of mortal certainty, yet experience and authority admonish us that it is a species of evidence in the application of which by the jury the utmost care, caution, and vigilence should be used.

Given.

W. K. GILDART, *Clk.*,
By C. F. JOHNSON, *D. C.*

No. 7. The jury are instructed that the supposition of guilt may be consistent with all the facts in evidence, and may account for their existence, and yet all the facts in evidence may fall short of that convincing proof of guilt necessary to convict on circumstantial evidence; and in this case the evidence as a whole must be such as to produce a moral certainty of the guilt of Gibson and to exclude any other hypothesis.

Given.

W. K. GILDART, *Clk.*,
By C. F. JOHNSON, *D. C.*

No. 8. The law clothes the defendant with the presumption of innocence, which he never loses until a verdict of guilty has been pro-
77 nounced, and by his plea of not guilty he puts upon the State the burden of establishing every fact necessary to constitute guilt, and if anything in the evidence for the State or the defendant suggests *of* the reasonable doubt of the existence of any material fact or circumstance to show the defendant's guilt as charged in the indictment the State can not stop short of removing this doubt; and if the jury believe from the evidence there remains a single reasonable doubt that the State has proved every allegation of the indictment they should acquit.

Given.

W. K. GILDART, *Clk.*,
By C. F. JOHNSON, *D. C.*

No. 9. The moment that a reasonable doubt is engendered in reference to any material fact or circumstance necessary to make out the allegations in the indictment, then the State must establish that fact or circumstance and remove the doubt, and the obligation to do this rests continuously upon the State. The defendant may do nothing save repose and rest upon the presumption of innocence with which the law has clothed him, and claim the benefit of all the doubts the evidence has shown, and if from the whole evidence the jury entertain a single reasonable doubt as to whether the killing was in self-defense, or of the guilt of the defendant as charged, they should acquit.

Given.

W. K. GILDART, *Clk.*,
By C. F. JOHNSON, *D. C.*

No. 10. The jury are instructed that they are not trying the defendant for any altercation of words, or insulting words, if any there were, between deceased and defendant, but are trying him for feloniously and with malice aforethought killing deceased, and that no words, however aggre-
78 vating, will prejudice one's rights of self-defense if attacked in consequence thereof; and if they believe from the evidence that Stinson produced a pistol after the wordy controversy with Gibson and followed him and made an attack upon him with the intention of using his pistol it in no way prejudices the right of self-defense on the part of Gibson; and if they further believe that Gibson shot Stinson to ward off the attack they shall acquit.

Given.

W. K. GILDART, *Clerk*,
By C. F. JOHNSON, *D. C.*

No. 12. The jury are instructed that it is the duty of the State to prove beyond a reasonable doubt that Gibson feloniously and with malice aforethought kill' Stinson; and if from the evidence in this case there is a probability that Stinson was not so killed by Gibson they must acquit.

Given.

W. K. GILDART, *Clk.*,
By C. F. JOHNSON, *D. C.*

No. 13. A reasonable doubt is that state of the case, after an entire consideration of all the evidence, leaves the minds of the jurors in that condition they can not say they feel an abiding conviction to a moral certainty of the truth of the charges, and the burden of proof is upon the State, and all the presumptions of the law are in favor of the innocence of the defendant, and every person is presumed to be innocent until he is proven guilty.

And if upon the evidence in this case there is a single reasonable doubt remaining the defendant is entitled to the benefit of it, and the jury should acquit the defendant.

Given.

W. K. GILDART, *Clk.*,
By C. F. JOHNSON, *D. C.*

79 No. 16. The court instructs the jury that a conflict in the work of two persons, and when one succeeds in withdrawing from it it is ended, and if the other pursues he assumes the attitude of an attacking party. And although they may believe from the evidence that John Gibson went to the house of Capt. Drummond armed with a pistol with the intention of insulting Stinson and then, if Stinson attacked him, to kill him, yet, if they further believe from the evidence that Capt. Drummond told Gibson to leave after his quarrel with Stinson, and Drummond let down the window and Gibson left with the intention of abandoning his purpose and did proceed to leave, and they further believe from the evidence that Stinson, when Gibson was proceeding to leave, armed himself and followed Gibson to the front gate with the intention of shooting him or doing him some great bodily harm, or that he went out without the intention of attacking Gibson and did attack him with the intention of killing him or doing him some great bodily harm, Gibson had a right to shoot Stinson to protect his own life, and the jury must acquit.

Given.

W. K. GILDART, *Clk.*,
By C. F. JOHNSON, *D. C.*

In the 5th instruction of defendant the court inserts the "material" before "circumstance;" in the 8th instruction for defendant court erased "suggests of the" and inserts "raises a."

The court refused the following instructions asked by the defendant:

Defendant's instructions refused.

80 No. 11. The jury are instructed that if they believe beyond a reasonable doubt from the evidence that, after the conversation between Gibson and Stinson at Drummond's, that he, Gibson, was leaving the premises and Stinson at once procured a pistol and went out of the house seeking Gibson to provoke a quarrel with him or with the intent of having an affray with him, and a difficulty did ensue, the State can not without some proof of a charge of conduct or action upon the part of Stinson convict Gibson, and they must acquit.

Refused.

WM. K. GILDART, *Clk.*

No. 14. The jury are instructed that the evidence of the prisoner's flight just after the killing is not sufficient alone to warrant a conviction, but may be considered by them in connection of the other evidence in the case, and it is for them to determine from all the evidence the cause that may have actuated his flight, and if they have a reasonable doubt as to why he fled or whether he killed Stinson as charged, they must acquit.

Refused.

WM. K. GILDART, *Clk.*

No. 15. The jury are instructed that one who is threatened with an immediate attack by an assault is authorized to act, and his actions are to be judged in the light of subsequent developments. And if the assailant follows him up in a threatening manner, in order to kill him or do him some great bodily harm, or in order to frighten him, and so as to make him believe that a violent attack is imminent, it is immaterial whether a forcible attack was actual or not; so if the jury believe from the evidence

that after the wordy altercation with Stinson at Capt. Drummond's
81 house that Capt. Drummond told Gibson to leave and he proceeded to leave, and that Stinson at once procured a pistol and followed Gibson to the front gate and approached him in a threatening manner so as to make Gibson believe that a violent attack was im'inent, Gibson had a right to defend himself and shoot Stinson, and the jury must acquit.

Refused.

WM. K. GILDART, *Clk.*

To the action of the court in refusing and modifying the instructions of the defendant, defendant then and there excepted. Defendant read the instructions thus modified by the court to the jury. After giving the instructions by court the jury retired to consider of their verdict, and afterwards the jury returned into court in the presence of the defendant the following:

Verdict.

We, the jury, find the defendant, John Gibson, guilty as charged in the indictment.

Thereupon the court rendered the following judgment:

Judgment.

STATE OF MISSISSIPPI
vs. } 4076.
JOHN GIBSON.

This day came the district attorney, who prosecutes on behalf of the State, and the defendant, John Gibson, in his own proper person, and it appearing to the court that the defendant, John Gibson, had been solemnly
82 arraigned and charged on an indictment herein of a charge of murder, and plead not guilty on a former term of this court, thereupon came a jury of good and lawful men, to wit, H. C. McGee and eleven others, who being duly empannelled and sworn to well and truly try the issue joined herein between the State of Mississippi and the said defendant, John Gibson, of a charge of murder, and a true verdict give according to the law and evidence, who after hearing the evidence and receiving the instructions of the court retired in charge of their bailiffs, specially sworn by the court to attend them, to consider of their verdict, and having considered of the same returned into open court in charge of their said bailiffs, and in the presence of the defendant, John Gibson, rendered the following verdict: "We, the jury, find the defendant, John Gibson, guilty as charged in the indictment;" and the said John Gibson being brought to the bar of the court and asked if he had anything to say why the sentence of the law should not be passed upon him, and answering said he had naught to say; whereupon the court ordered that the said John Gibson be taken to the county jail and confined therein and there safely kept by the sheriff of Washington County until Friday, the first (1st) day of March, 1895, when the said sheriff of said county shall, between the hours of 9 o'clock a. m. and 4 o'clock p. m., hang the said John Gibson by the neck until he is dead. The said execution shall take place within the inclosure of the jail, unless some other place for the execution be designated by the board of super-

visors of Washington County. It is further ordered that the clerk of this court furnish the said sheriff a certified copy of this order,
83 and that he also issue the proper writ of execution, said defendant being present in open court (January 12th, 1895).

And on the 17th day of January, being a day of said court, defendant presented to the court his motion for a new trial.

Motion for a new trial.

STATE OF MISSISSIPPI
vs. } No. 4076.
JOHN GIBSON.

And now comes the defendant, John Gibson, and moves the court to set aside the verdict and grant him a new trial in this cause for the following reasons, to wit:

1. Because the verdict is contrary to law.
2. Because the verdict is contrary to the evidence.
3. Because the court erred in overruling defendant's petition filed in the cause for the removal of this cause to the United States circuit court for the western division of the southern district of the State of Mississippi.
4. Because the court erred in the ordering of the special venire in this cause in the following words: "To the sheriff of Washington County, Mississippi: You are commanded to summon from the good and lawful body of Washington County fifty men to be and appear before the court on Friday, Jan'y 11th, 1895, at 9 o'clock a. m., to serve especially as jurors in this cause."
5. Because the court erred in overruling defendant's motion to
84 quash the special venire of fifty men summoned under the above order of the court.
6. Because the court erred in overruling defendant's objection to the testimony of W. D. Love about the clothes of Stinson and the introduction of the clothes.
7. Because the court erred in overruling defendant's objection to W. D. Love's testimony about the pistol and motion to exclude same.
8. Because the court erred in granting the 1st, 2nd, 5th, and 6th instruction asked by the State.
9. Because the court erred in refusing the 11th, 14th, and 15th instruction asked by the defendant.
10. Because the court erred in inserting the word "material" before the word "circumstance" in two instances in the 5th instruction for the defendant.
11. Because the court erred in striking out the word "suggests" in the 8th instruction and inserting therefor the word "raises."

Wherefore, &c.

G. W. THOMAS,
C. J. JONES,
Attys. for Deft.

Filed Jan'y 15, '95.

WM. K. GILDART, *Clk.*,
By CHAS. F. JOHNSON, *D. C.*

The court ordered and adjudged that said motion be overruled.

Order overruling motion for new trial.

STATE OF MISSISSIPPI
vs. } No. 4076.
JOHN GIBSON.

85 This cause coming on to be heard on motion for a new trial, and the court, after hearing same and being sufficiently advised, doth therefore order that the same be, and is hereby, overruled, and the defendant then and there excepted and prayed an appeal; said appeal was granted, and sixty days were granted defendant by the court in which to prepare his *his* bill of exceptions. (January 17th, 1895.)

To the action of the court in overruling said motion defendant then and there excepted.

Petition for appeal.

THE STATE OF MISSISSIPPI,
Washington County:

To the circuit clerk of Washington County:

This petition respectfully shows to W. K. Gildart, said circuit clerk, that John Gibson, having been convicted on the 6th day of the criminal term of the court of said county and sentenced to be hung on a future day, and said Gibson feeling himself aggrieved thereby, doth there make this his application for an appeal to the supreme court of the State, and tenders this his written application for said appeal according to law.

JOHN GIBSON.

Filed Jan'y 17, '95.

WM. K. GILDART, *Clk.*,
By CHAS. F. JOHNSON, *D. C.*

86 *Pauper's oath.*

THE STATE OF MISSISSIPPI,
Washington County:

This day personally appeared before me, the undersigned circuit clerk of said county, John Gibson, who, on oath, says: "I, John Gibson, do solemnly swear that I am a citizen of the State of Mississippi, and because of my poverty I am not able to pay the costs or give security for the same in the appeal I am about to take to the supreme court of the State aforesaid from the judgment of the circuit court at the January term, 1895, and that to the best of my belief I am entitled to the redress which I seek by said appeal.

JOHN GIBSON.

Sworn to and subscribed this the 17 day of Jan., 1895.

WM. K. GILDART, *Clk.*,
By CHAS. F. JOHNSON, *D. C.*

Filed Jan'y 17, '95.

WM. K. GILDART, *Clk.*,
By CHAS. F. JOHNSON, *D. C.*

And to all the said rulings of said court as aforesaid and except to defendant excepts and tenders this his bill of exceptions and asks the

same be signed and made a part of the record in the case, which is accordingly done. This the 25 day of February, 1895.

R. W. WILLIAMSON, *Judge.*

I do certify that the evidence as taken down and typewritten by the stenographer should be copied in literally (as it is in this bill of exceptions), in order that justice may be done in the case, both to the
87 State and the defendant. (Febr'y 25th, 1895.)

R. W. WILLIAMSON, *Trial Judge.*

Filed Febr'y 28th, '95.

WM. K. GILDART, *Clk.*,
By CHAS. F. JOHNSON, *D. C.*

STATE OF MISSISSIPPI,
Washington County:

I, Wm. K. Gildart, clerk of the circuit court of Washington County, State of Mississippi, do hereby certify that the foregoing 102 pages contain a true and perfect copy of the record and proceedings had at the January (criminal) term, 1895, of the circuit court in the case of the State of Mississippi vs. John Gibson, as the same appears of record in my office.

Given under my hand an' official seal this the 8th day of March, 1895.

[SEAL.] WM. K. GILDART, *Circuit Clerk,*
By CHAS. F. JOHNSON, *D. C.*

(Endorsed:) Filed March 11th, 1895. Oliver Clifton, clerk, by C. C. Campbell, D. C.

And on the 13th day of March, 1895, an assignment of errors was filed in said supreme court of Mississippi, in the following words and figures, to wit:

88 JOHN GIBSON } The State of Mississippi. In the supreme court.
vs. } To March term, 1895.
THE STATE. }

To the many errors excepted to in the trial court appellant assigns the following:

(1) The court erred in overruling defendant's motion by petition for the removal of the trial of the indictment wherein he was charged and arraigned for murder to the United States circuit court for the western division of the southern district of the State of Mississippi.

(2) The court erred overruling the defendant's motion to quash the special venire summoned by the sheriff of the county of Washington, under the order: "To the sheriff of Washington County, in said State: You are hereby commanded to summon fifty men from the good and lawful body of Washington County," &c.

(3) The court erred in overruling defendant's objection to State witness Drummond answering a question propounded by the district attorney, as follows: "Are those clothes here that he had on?" because the coat was not there.

(4) The court erred in overruling defendant's objection to the question propounded by the district attorney to State witness Drummond, as fol-

lows: "Didn't he have on a coat that night?" Also defendant objected to the introduction of the clothes, which the court erred in overruling.

(5) The court erred in overruling defendant's objection to the question propounded to State witness Drummond by the district attorney,
89 as follows: "Who brought that pistol in there?"

(6) The court erred in overruling defendant's objection to the question propounded to State witness Drummond by the district attorney as follows: "When he brought the pistol in there, what was done with the pistol?"

(7) The court erred in overruling defendant's objection to the question asked State witness Drummond by the district attorney, as follows: "How many barrels had the appearance of being recently fired?"

(8) The court erred in overruling defendant's motion to exclude all the testimony of the witness Drummond about the pistol.

(9) The court erred in overruling defendant's objection to the question put to State witness W. D. Love by the district attorney, "State what was the condition of the pistol when you saw it at Captain Drummond's house that night after the killing?" at same time exhibiting the pistol, and defendant then and there objecting to the introduction of the pistol, which the court erred in overruling.

(10) The court erred in overruling defendant's motion to exclude all testimony for the State concerning the pistol.

(11) The court erred in overruling the objection of defendant to the question asked by the State to the State witness Love, "See if you recognize anything there that he wore that night"—same time showing some clothes.

(12) Defendant objected to the exhibition of the clothes to the witness Love before the jury, which the court erred in overruling.

(13) The court erred in overruling defendant's objection to the question asked State witness Love by the district attorney: "The coat was
90 introduced on the first trial, as I understand."

(14) The court erred in overruling defendant's motion to exclude all testimony in regard to clothes and pistol as introduced.

(15) The court erred in overruling objection of defendant to the question asked by the district attorney on redirect examination of State witness Drummond: "The hands were to be settled with at the store."

(16) The court erred in granting the first instruction for the State.

(17) The court erred in granting the 2ond instruction for the State.

(18) The court erred in granting the 5th instruction for the State.

(19) The court erred in refusing the 11th instruction for the defendant.

(20) The court erred in refusing the 14th instruction for the defendant.

(21) The court erred in refusing the 15th instruction for the defendant.

(22) The court erred in modifying the 5th instruction given for defendant by inserting the word "material" before the word "circumstances."

(23) The court erred in modifying the 8th instruction given for defendant by striking out the word "suggests" and inserted the word "raises."

(24) The court erred in overruling the defendant's motion for a new trial.

C. J. JONES,
Attorney for Appellant.

(Endorsed:) Filed Mch. 13, 1895. Oliver Clifton, clerk, by C. C. Campbell, D. C.

91 And on the 18th day of March, 1895, the following order of submission was made by the supreme court of Mississippi, to wit:

JOHN GIBSON
v. } 8083.
STATE OF MISSISSIPPI.

Submitted on briefs by Mess'. C. J. Jones and G. W. Thomas for the appellant, with leave to the attorney-general to file brief during the week.

And on the 27th day of May, 1895, said supreme court filed and opinion in said cause, in words and figures following, to wit:

92 JOHN GIBSON
vs.
STATE.

WHITFIELD, J., delivered the opinion of the court.

There was no error in overruling the motion to remove the case to the Federal court. This is settled by the case of Neal vs. Delaware, 103 U. S., 370.

There was no motion here to quash the indictment.

The eleventh instruction for the defendant was properly refused. It authorized the jury conclusively to infer from the fact—if they believe from the evidence that it was the fact—that Stinson left the house with the purpose of provoking a difficulty; that that purpose continued, and Stinson did, in fact, provoke it, and was the aggressor, unless the State proved the contrary. The whole evidence was to be looked to in arriving at a just conclusion as to the conduct of the parties at the time. The instruction was misleading.

The 15th instruction announces what seems already fully covered by the 10th and 16th instructions granted to the defendant; and its refusal, if error, is not reversible error. It' refusal could have worked no harm.

There are twenty-four assignments of error, but we find no reversible error.

Of the sufficiency of the evidence the jury are the judges, and this is the third verdict of guilty of murder. We do not feel warranted, after the most careful consideration of the case, in disturbing the verdict.

Affirmed.

93 And on the 27th day of May, 1895, a final judgment was rendered by said supreme court of Mississippi, in the following words and figures, to wit:

JOHN GIBSON
vs. } No. 8083.
STATE OF MISSISSIPPI.

This cause having been submitted on a former day of this term, on the record herein from the circuit court of Washington County, and this court, having sufficiently examined and considered the same and being of opinion that there is no error therein, doth order and adjudge that the judgment of said circuit court, rendered in this cause at the January term

thereof, A. D. 1895, on the 12 day of January, 1895, be, and the same is hereby, affirmed; and it is further ordered and adjudged by this court that the appellant, the said John Gibson, for such his crime of murder, be kept in close confinement in the jail of said county until Wednesday, the 17th day of July, 1895, on which day, between the hours of 10 o'clock a. m. and 4 o'clock p. m., he, the said John Gibson, shall, by the sheriff of said county, within the inclosure of said jail or at such other place of execution as the board of supervisors of said county may designate according to law, be hanged by the neck until he be dead.

94 *Petition for writ of error.*

In the Supreme Court of the United States.

EX PARTE JOHN GIBSON.

Application for the writ of error.

To the Honorable M. W. Fuller, Chief Justice of the Supreme Court of the United States:

Now comes John Gibson, and by his attorney, Cornelius J. Jones, representing to this honorable court that on the first day of the January criminal term of the circuit court of Washington County, Mississippi, 1895, said John Gibson was arraigned before the court upon an indictment charging him with murder. The said John Gibson, then and there before pleading thereto, made an application to the said circuit court for the removal of the trial of said indictment from the said State court to the United States circuit court for the western division of the southern district of the State of Mississippi. Said petition was duly filed in said court and sworn to upon knowledge and belief by said defendant, John Gibson.

Relator alleged in the said petition for said removal that he was about to be put upon trial for his life upon an indictment which was not presented by a regular and legal grand jury of said county.

Relator alleged in said petition that he was a negro, color black, and a member of the descendants of the African race, and that he was by said indictment charged with the killing of one Robert Stinson, a
95 white man and a member of the Anglo-Saxon race; and that because of the fact that he was so charged with such killing aforesaid, there existed against him on the account of his color great race prejudice in the county and State, and that the said indictment, which it was the purpose of the court to try him on, was presented at the December term of the said circuit court, 1892. Relator alleged in said petition that at the time the said grand jurors were drawn for the said December term of said court, the killing having *having* occurred Jan., 1891, the expressed race prejudice against him on the account of his color was quite prevalent throughout the county and State by the white race; and that, therefore, the laws of the State then in force relative to the listing, selecting, and drawing jurors for the said circuit court was not by the officers of the county aforesaid, charged under the law with the duty of selecting and listing grand jurors for said term of said court, observed,

to the great prejudice of the defendant, John Gibson, on account of his race and color. Relator alleged in said petition that the annotated code of the said State which was in force and effect on the 16th day of December, 1892, prescribes how grand jurors for the several circuit courts of the State shall be drawn; and that, preparatory to the selection of grand jurors for said December term of said circuit court for the term of 1892 no list of qualified voters were selected from the registration roll by the board of supervisors of the said county, nor did the chancery clerk, circuit clerk, and sheriff of said county select a list of names from any certified list from said board of supervisors, nor was any such list of names deposited in the jury box of the county, as required by law, nor
96 did said sheriff and clerks of the county aforesaid draw any list of jurors from said jury box to serve as jurors for the first week of the December term, 1892; that the court should on the first day thereof select the requisite number as grand jurors for said term, as the law directs; nor was the grand jury which presented the said indictment so selected and summoned, as said law directs, but the relator charges in said petition that the officers of the law of said county charged with the duty of listing, drawing, and selecting jurors for the first week of said term of said court from which said grand jury would have been drawn, willfully, intentionally, disregarded the State law in the selection of the said grand jurors for the said December term, 1892; which grand jury selected in disregard to the State law, with said purpose and intention on part of said officers aforesaid, selected all white men, members of the white or Anglo-Saxon race, which selection of said grand jurors as aforesaid was on the account of their race and color, to the known prejudice of the defendant, John Gibson, on the account of his color and race.

Relator further alleged in said petition that at the time of the selection of said grand jury, which afterwards indicted him, there were in the county of Washington 3,500, or thereabouts, number of persons of the negro race qualified for jury service, and about 1,500 white qualified persons eligible to jury service. And that had the law relative to the listing, selecting, and drawing said list of jurors for said December term been regarded and conformed to by said officers of the county charged under the State law with the duty of so selecting a list of persons
97 from which said grand jury of said term was to have been drawn, that there would have been some names of colored persons drawn on said list, and the court conforming to the law, would have drawn some names of colored qualified persons on the grand jury for said term. But that because of the great prejudice entertained against the defendant by the white race, on the account of his (defendant's) color, said officers in selecting said grand jurors as aforesaid, purposely and intentionally excluded from said list of jurors all names of colored qualified jurors, though many were competent, which exclusion was on the account of their color and race, for the express purpose of securing the presentment against the defendant, John Gibson, because of the prejudice against him on the account of his color and race.

Relator further stated in said petition for removal that he was a citizen of the United States and insisted upon being tried for his life by an impartial jury, and that he was, under the Constitution of the United

States, entitled to equal protection by the laws of the State of Mississippi, and under that Federal Constitution protected from having his liberty and life jeopardized except by due process of the laws of said State. And that the prejudice then and there prevailing against him by the white race assured him that he could not be secured a fair and impartial trial, and that to force him to trial on said indictment would be depriving him by the State of Mississippi, by the duly established courts thereof, of his liberty without due process of law, and should he be returned guilty as charged by the petit jury that he would be
98 deprived of his life without due process of the laws of said State and a denial to him by said State authorities the equal protection of the laws of said State reserved to him under the said Constitution of the United States. The said petition being written and submitted to the court, relator prayed the court that process issue for the said officers of the county under the seal of the said court summoning them instanter to appear before the said court and give evidence in this matter, but the said court denied the petition without granting process prayed for or having the State to deny the said allegations of the petition or assigning any reason; to which ruling of the court the defendant then and there reserved an exception. On the fifth day of said January, 1895, term of said court the defendant, John Gibson, was put upon his trial for his life and on the sixth day thereof was convicted. Relator made a motion for a new trial regularly and in open court, and among other reasons assigned therein for said new trial he again brought to the attention of the trial court the error in overruling the petition for the removal of said cause to the Federal court aforesaid, which motion the court overruled and the defendant reserved exception. Thereupon the court proceeded to pronounce the sentence of the law upon said John Gibson and did sentence him to the death penalty, to be executed on the 1st day of March, 1895. Relator then and there prayed an appeal to the March term of the supreme court of the State of Mississippi, then being March, 1895, which appeal was granted regularly and duly perfected, and in due course of matters and proceedings defendant tendered his bill of
99 exceptions to the trial judge according to the laws of said State, which was duly signed and sealed by the trial *trial* judge. The bill of exceptions, among various assignments of error, also embodied therein was that the court erred in overruling defendant's petition for the removal of his trial to the Federal court. In due course of proceedings and in due time the circuit clerk of said county made a complete transcript of the entire record of proceedings had in the trial court aforesaid and duly certified same to State supreme court aforesaid, being the highest court of appeals in the State of Mississippi. Said record so certified contained the petition for the removal from the State court aforesaid the said cause to the Federal court aforesaid as the law directs. And that appellate court, in its appellate jurisdiction and capacity as the said highest court of appeals in said State, has carefully reviewed the record so certified thereto aforesaid. And said court on or about the 26 day of May, 1895, having duly considered the Federal question of removal of the said cause to the Federal court aforesaid, did decide the said question distinctly and affirmed the judgment of the trial court, and also said supreme court affirmed the judgment of the circuit court aforesaid generally, and fixed the 17th day of July, 1895, as the day of execution.

Now, relator charges that the indictment upon which he was tried was not procured by a regularly authorized grand jury of Washington County, Mississippi; that the trial upon which he was convicted was not a trial upon an indictment legally presented by a grand jury of the county in which the crime is alleged to have been committed; that the
100 presentment of the indictment, the trial thereof, and the conviction and the sentence of the court were in violation to the provisions of the Constitution of the United States, and proof of the allegations herein your petitioner is here ready to submit.

Wherefore your petitioner prays that the writ of error and supersedeas may issue from the Supreme Court of the United States to the said supreme court of the State of Mississippi, and that proceedings may be staid until the said Federal Supreme Court shall hear and determine whether your said petitioner has been indicted, tried, convicted, and sentenced in accordance with the provisions of the Constitution of the United States, and until the further order of the court herein.

Your petitioner has made no previous application for the writ of error or supersedeas to any of the judges of this court, and that he has no other remedy.

And in duty bound doth forever pray.

JOHN GIBSON,
By CORNELIUS J. JONES,
Attorney.

GREENVILLE, MISS., *June 7, 1895.*

THE STATE OF MISSISSIPPI,
Washington County:

This day personally appeared before me, the undersigned acknowledging officer for said county, duly authorized under the laws of said State, Cornelius J. Jones, attorney for John Gibson, relator in the foregoing peti-
101 tion, who on oath, being first duly sworn by me, says that the facts set out in the foregoing petition as to the petition for removal of the cause to the Federal court, and the allegations thereof, are true and correct to the best of his information, which information was obtained from the record of said trial to the best of his recollection of the said proceedings and the record thereof, and the other facts therein stated are true and correct to the best of his information obtained from John Gibson, and that he verily believes the information so received to be true and correct.

CORNELIUS J. JONES.

Sworn to and subscribed to before me, the undersigned, H. Robb, this the 7 day of June, 1895.

[SEAL.] I. H. ROBB, *Notary Public.*

Writ of error allowed to operate as a supersedeas, but not to be construed as admitting to bail.

E. D. WHITE,
Associate Justice Supreme Court of the U. S.

MONMOUTH BEACH, N. J., *July 15th, 1895.*

(Endorsed:) Filed July 20, 1895. Oliver Clifton, clerk.

102 [Original.]

UNITED STATES OF AMERICA, *ss:*

The President of the United States of America to the honorable the judges of the supreme court of the State of Mississippi, greeting:

Because in the record and proceedings as also in the rendition of the judgment of a plea which is in the said supreme court before you, or some of you, being the highest court of law or equity of the said State in which a decision could be had in the said suit between The State of Mississippi and John Gibson, wherein was drawn in question the validity of a treaty or statute of, or an authority exercised under, the United States, and the decision was against their validity; or wherein was drawn in question the validity of a statute of, or an authority exercised under, said State, on the ground of their being repugnant to the Constitution, treaties, or laws of the United States, and the decision was in favor of such their validity; or wherein was drawn in question the construction of a clause of the Constitution, or of a treaty or statute of,
103 or commission held under, the United States, and the decision was against the title, right, privilege, or exemption specially set up or claimed under such clause of the said Constitution, treaty, statute, or commission; a manifest error hath happened to the great damage of the said John Gibson, as by his complaint appears. We being willing that error, if any hath been, should be duly corrected and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same in the said Supreme Court at Washington within 30 days from the date hereof, that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error, what of right and according to the laws and customs of the United States should be done.

Witness the Honorable Melville W. Fuller, Chief Justice of the United States, the 17th day of July, in the year of our Lord one thousand eight hundred and ninety-five.

JAMES H. MCKENNEY,
Clerk of the Supreme Court of the United States.

Allowed by

E. D. WHITE,
Associate Justice Supreme Court of the United States.

(Indorsed:) Filed July 20, 1895. Oliver Clifton, clerk.

104 [Original.]

UNITED STATES OF AMERICA, *ss:*

To the State of Mississippi, greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, at Washington, within 30 days from the date

hereof, pursuant to a writ of error filed in the clerk's office of the supreme court of the State of Mississippi, wherein John Gibson is plaintiff in error and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error as in the said writ of error mentioned should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness, the honorable Edward D. White, associate justice of the Supreme Court of the United States this 17th day of July, in the year of our Lord one thousand eight hundred and ninety-five.

E. D. WHITE,
Associate Justice of the Supreme Court of the United States.

On this 6th day of August, in the year of our Lord one thousand eight hundred and ninety-five, personally appeared before me, the subscriber, C. C. Campbell, deputy clerk of the supreme court of Mississippi, and makes oath that he deliverd a true copy of the within citation to Frank Johnston, attorney-general of Mississippi.

C. C. CAMPBELL,
Deputy Clerk.

Sworn to and subscribed the 6th day of August, A. D. 1895.

[SEAL.] E. M. PARKER,
Notary Public.

I hereby acknowledge service of the within writ.

FRANK JOHNSTON,
Attorney-General of Mississippi.

Aug. 6th, 1895.

(Indorsed:) Filed Aug. 6th, 1895. Oliver Clifton, clerk, by C. C. Campbell, D. C.

105 STATE OF MISSISSIPPI,
Supreme Court:

I, Oliver Clifton, clerk of the supreme court of Mississippi, do hereby certify that the above and foregoing 104 pages contain a true and correct copy of the record in the case of (No. 8083) John Gibson v. State of Mississippi, on appeal from the circuit court of Washington County and lately determined by said supreme court, and copies of the assignment of errors, order of submission, opinion and judgment of supreme court, petition for writ of error and order allowing same, together with the original writ of error and original citation, duly served, as the same appear of record and on file in my office.

Witness my hand and seal of said supreme court, at office at Jackson, this the 10th day of August, A. D. 1895.

[SEAL.] OLIVER CLIFTON, *Clerk,*
By C. C. CAMPBELL, *D. C.*

Fee for making transcript, $45.00, still due and unpaid.

OLIVER CLIFTON, *Clerk,*
By C. C. CAMPBELL, *D. C.*

(Indorsement on cover:) Case No. 16001. Term No. 711. John Gibson, plaintiff in error, vs. The State of Mississippi. Mississippi supreme court. Filed August 22, 1895. Supreme Court U. S. Clerk's office. Received Aug. 14, 1895.

DEC 5 18
JAMES H. McKENNEY
CLE

IN THE

SUPREME COURT OF THE UNITED STATES.

October Term, 1895.

JOHN GIBSON, PLAINTIFF IN ERROR,

vs.

THE STATE OF MISSISSIPPI.

No. 711.

BRIEF OF THE PLAINTIFF IN ERROR.

CORNELIUS J JONES, EMANUEL M. HEWLETT,
Attorneys for Plaintiff in Error.

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IN THE SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1895.

John Gibson, plaintiff in error.
vs.
The State of Mississippi. } No. 711.

BRIEF OF PLAINTIFF IN ERROR.

STATEMENT OF THE CASE

The criminal prosecution here presented upon a writ of error was instituted against John Gibson, a colored man, charging him with the crime of murder. The record brought here and filed shows that the said John Gibson was indicted at the December term, 1892, of the circuit court of Washington County, in the State of Mississippi. The said Gibson was placed on trial at the January term, 1895, of the criminal court of the said county, and before plea entered the said John Gibson filed a petition for the removal of his trial from the State Court aforesaid to the United States Circuit Court for the Western Division of the Southern Division of the State of Mississippi; which petition was duly sworn to by the said Gibson upon knowledge and belief; which is of record herein, page 1–3.

The trial court denied the said petition said order of denial is of record herein, page 3; the said John Gibson then and there excepted to the ruling of the court therein as shown of record, page 3.

The trial court then proceeded with the case when the said John Gibson demanded a special venire, which was ordered by the court in the words and figures as shown in said order on page 5 of the record herein.

The said John Gibson on the return day of the writ of venire *facias* so ordered by the court moved the court to quash the venire so ordered in the words and figures aforesaid; which said motion to quash the venire is of record herein, page 6; which motion was overruled by the court and exceptions taken by said John Gibson, which said order overruling the motion to quash is of record herein, page 6.

The trial was proceeded with and the accused was convicted and sentenced to the death penalty.

The accused made a motion for a new trial and duly addressed the error in denying the petition for removal of his trial to the Federal Dis-

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rict Court, and the motion to quash the special venire to the judicial notice of the court among other exceptions, and the trial court then and there overruled the said motion, which is of record, page 51; and the order overruling the same is of record herein, page 52.

The accused took regular steps by way of appeal to the Supreme Court of the state of Mississippi and assigned to that court all the matters and things excepted to in the trial court, as a complete assignment of errors in this cause; which said Supreme Court of the state, having distinctly passed upon the rulings of the trial court, relative to the said petition for removal, and the motion to quash the venire and the motion for a new trial, did affirm the rulings of the trial court and fixed the 17th day of July 1895, as the day upon which the said accused should be executed. (record page 55–56.

The accused feeling himself aggrieved thereby, sued out the writ of error herein, and of record page 56 to 59 thereof, and hence the cause is in this court upon ultimate review.

Assignments of Error.

The following is assigned by the plaintiff in error as error in the rulings of the state courts.

The trial court erred in denying the petition for removal from the state court to the Federal Court.

Virginia vs Rives—100 U. S. 313.
Ex parte Virginia—100 U. S. 339.
Strauder vs West Virginia—100 U. S. 303.
Neal vs Delaware—103 U. S. 370.
Bush vs Kentucky—107 U. S. 110.

(2) The trial court erred in overruling the motion to quash the special venire.

(3) The trial court erred in overruling the motion for a new trial. (Same authorities as above cited)

(4) the trial court erred in correcting the minutes of the first day of trial, on the return day of the venire, by modifying the original order directing the issuance of the said venire facias.

(5) The Supreme Court of the state of Mississippi erred in sustaining the ruling of the trial court in the denial of the petition for removal to the Federal District Court. (Authorities as cited above)

(6) The said Supreme Court erred in affirming the judgement of trial court and fixing the 17th day of July 1895, as the day of execution of the said judgment.

Citations.

Slaughterhouse cases, 16 Wall 36–83 U. S. xxi. 394.
Strauder vs West Virginia—100 U. S. 303.
Neal vs Delaware 103 U. S. 370.
Prigg vs Connecticut—16 Pet. 539.
Virginia vs Rives—100 U. S. 313.
Ex parte Virginia—100 U. S. 339.
U. S. vs. Reese—92 U S. 214.
100 U. S. 322.
100 U. S 321, 345.

103 U. S. 385, 551.
107 U. S. 120.
109 U. S. 34, 36, 44, 49, 50.
112 U. S. 101.
93 New York 446, 455, 458, 460.
50 Connecticut 133.
47 American Report 627.
45 American Report 236 244.
40 American Report 491.
Cooley on Const. lim. page 18.
Note 3 Green vs Lesse 16 Pet.
page 291 298.

Arguments.

The question which addresses itself to this court is whether the plaintiff in error was indicted, tried, and convicted in the state courts regularly, and in due course of law as prescribed by the laws of said state of Mississippi and the Constitution and laws of the United States.

It is well settled in the law and practice of this court that in dealing with this question, the record alone is to be looked to, in ascertaining the true issue, and in due respect to the law, custom, and practice of the court, we shall briefly review the parts of the record which are considered material to the issue thus presented: but before we refer to the record proper, we shall first inform the court that the claim which plaintiff in error sets up in asserting his right to the relief, by this proceeding sought, is, that he, John Gibson, a citizen, and a person of color, was within the jurisdiction of the state of Mississippi, by that state denied the equal protection of the laws thereof.

That he, said plaintiff in error, was by the agents and officers of said State purposely discriminated against on account of his race, a Negro, and color, black. These facts are charged and were charged in the trial State court, and it becomes us to establish the law of the United States under which such rights could have been justly claimed by us, and so establishing the law to the satisfaction of this court we shall traverse this record for the purpose of establishing the fact that these charges were duly and seasonably made, and thereafter to look to the record for proof of the charges so made.

The Fourteenth Article of Amendment to the Federal Constitution is asserted by the plaintiff in error as the law of the United States, which reserves to him the right to have been first duly and regularly indicted by a grand jury of Washington county duly elected, summoned, sworn and charged according to the laws of the State without partiality to the race or color of said jurors and without prejudice to the accused on account of the offense charged or his race and color.

It must be admitted that these rights are prescribed in our Federal Constitution; Fourteenth Amendment thereof, and wherever asserted a constitutional right is asserted, and the provisions of that amendment in providing that no State shall deny to any person within its jurisdiction equal protection of the laws thereof and that no person shall be discriminated against by any State on the account of race, color or previous condition of servitude were, but an enlargement of the "Bill of

rights" first declared by the American people.

The intention of the people at the time of the enactment of that amendment has always been clearly considered by this court which whenever required to, has spoken out in judicial firmness and cogent enunciation, and, frequently outmeasured the narrow confines of the mere letter of the constitution; and we are advised by the soundest doctrine of this court, that the condition of the people at the time the law was enacted, must be clearly looked into when construing such provisions. The object sought to be accomplished, the protection intended, and the calamity threatened.

We are serious in our contention as to the principles underlying our constitution, and the peculiar form of our government, created under the circumstances, and established in the face of conditions, and environments characteristic of our form of government.

The court will clearly observe that we are addressing ourselves to the spirit of the law, claiming the extension of the great principles underlying our American institution as an intervention in our behalf in this matter, standing high above all technicalities, and informalities.

We appeal to this court, and to human conscience to know if these cherished principles were ever more vividly shown, with more magnificent splendor, digested in fewer and more fitting terms, than can be observed in that series of prohibitions that no State shall make or enforce any law which shall abridge the privileges or immunities of any citizen of the United States: that no state shall deprive any person of life, liberty or property, without due process of law: that no state shall deny to any person within its jurisdiction, the equal protection of its laws. We contend, that the position taken by us in the premises, is in happy conciliation with the position taken, and the doctrine announced by the supreme court of New York, "Cooleys Constitutional limitation, page 199 and 200," wherein that court was considering the rights of the city of New York to certain co-operate property, said, "The inhabitants of the city of New York have a vested right in the city halls, markets, water works, ferries and other public property, which cannot be taken from them, any more than their individual dwellings, or store houses: their rights in this respect rests, not merely upon the constitution, but upon the great principle of *eternal justice* which lies at the foundation of all free governments."

In this case the court demonstrated the humane libertality with which, regulations in any way defining the fundamental rights of a people, should be construed, when the express letter of which rule, or regulation, is wanting in requisite fullness; and further that the principle underlying a free government, is superior to the uncertain letter, even of the constitution: thus we insist, that when the letter of our federal constitution inhibits any state from discriminating against any person within its jurisdiction on the account of race and color, although the letter thereof does not say how a state can discriminate against any person within its jurisdiction in a manner prohibited by the Federal Government, yet when reason moves upon the altar of our counsels, clearly interpreting the object and intent of the makers of the organic law; and while it is conceded that the letter of the 14th Amendment to the Constitution is wanting in requisite fulness in this respect, we observe that the object aimed at by the makers of the

fundamental law, at the time such law was enacted, was to secure the blessings of equal legal protection to every newly emancipated person within the jurisdiction of the United States. 50 Con.—133.

"The Supreme Court has held that in construing the recent amendments to the Federal Constitution, although they are general in terms, it is to be considered that they were passed with reference to the exigencies growing out of the emancipation of the slaves;" and in the case at bar the plaintiff in error being an ex slave, and complaining as he does of the acts of the jury officers of Washington County, State of Mississippi, in selecting, listing, drawing, summoning, and the trial court in empanelling and charging the grand jury at the December term of the circuit court of said county for the year 1892, in selecting all white men to serve as grand jurors for said term, purposely on the account of their color, white, and their being at the time of selecting said Grand Jury as aforesaid in the county of Washington duly qualified for jury service, seven thousand Negroes who were by the said jury officers purposely excluded from said grand jury, for the express purpose of procuring this indictment against him (the accused) because he was charged with the murder of a white man, and the account of race prejudice, such acts on part of such officers fall within these federal prohibitions. 45 Am. Rept.—236.

"The history of the 14th Amendment is familiar to all, and all the purposes of this amendment may be briefly summarized. At the time of its adoption, the colored race had been recently emancipated from a condition of servitude, and made citizens of the States.

It was apprehended that in some of the States of the Union, feeling of antipathy between the races, would cause the dominant race by unfriendly legislation to abridge the rights of the other, and deny to them equal privileges and protection of the laws; to guard the previously subjected race from the effect of discrimination; these provisions are made a part of the fundamental law of the land and their rights were placed under the protection of the Federal Government. It was designed to assure the colored race the enjoyment of all of the civil rights that under the law are enjoyed by white persons, and to give that race the protection of the Federal Government, in that enjoyment when it should be denied by the States." Slaughter house cases; 16 Wall 67.

Considering these authorities, we seriously contend that no other construction can be placed upon such actions of the said jury officers of Washington County aforesaid as are complained of in the petition for removal, especially after having been brought to the judicial notice of the trial court, and by that court approved, than, that the discrimination complained of, was the action of the State of Mississippi.

Now briefly reviewing the record, we purpose to establish to the full satisfaction of this honorable court, that the accused did in due time, his full duty.

The accused filed his petition for the removal of his trial from the circuit court of Washington County, State of Mississippi, to the United States Circuit Court for the Western division of the Southern district of Mississippi.

It is charged in that petition that the accused was purposely discriminated against on account of his race, a Negro, and color black; by the exclusion from the grand jury which presented the indictment therein filed against him, all members of his race, on account of their race

and color. This exclusion complained of was charged to the officers of the said county, who were charged under the laws with the duty of selecting, listing, summoning, empaneling, and charging the said grand jury, and that the petit jury which was summoned to try the accused, was a jury of white men selected and procured, with the same gross irregularities as was the grand jury herein complained of, and for the same purposes.

The accused duly swore to that petition upon knowledge and belief. The trial court heard the petition and without any resistance on part of the State, denied the same and the accused was forced to trial.

Now then, the regular steps by way of appeal to the State Supreme Court have been taken, and judgment of affirmance having been rendered by that court, the record stands in this court for ultimate review.

The laws of the State of Mississippi regarding the selectiing, listing and forming the grand jury of the county aforesaid, cannot and are not complained of as the law; but the white race of the county of Washington entertaining such great prejudice against the Negro race, and especially the accused, which prejudice was charged in the petition for removal, and the said officers of the law being all members of the white race, did in their proceedings in the discharge of their duty in the said selection of jurors wilfully and purposely turn from the well directed paths prescribed by the legislature of the State of Mississippi; had they adhered to the letter of the State law the registration roll of the voters of the county should have been used by the Board of Supervisors of the county in listing the names of persons to serve as grand jurors for said December term of said circuit court.

The only qualifications required for jury service of any one under the law are likewise required of persons to be qualified voters in said county and State. Then assuming that the Board of Supervisors did regularly select and list the names of the jurors for that term of the court at which the indictment was presented, and certified the same according to law, in face of the fact that on the registration roll of voters at that time there were seven thousand Negroes of the county duly qualified for jury service and enrolled upon the registration roll of voters of the county and only fifteen hundred white persons of the county so qualified, and the number of names required by law having therefrom been regularly drawn, delivered to the circuit clerk of said county by the clerk of the said Board of Supervisors, and by the circuit clerk aforesaid, each name was copied on a separate slip of paper and regularly deposited in the jury box of the county; we appeal to the reason of this court to know, if under these conditions any result could have been attained other than a fair and equitable listing of jurors for said term of court.

With these steps regularly taken by the proper authorities, followed up with the further requirements of the law, the names of the jurors listed, certified, and delivered to the circuit clerk of the county, who copies the names on separate slips of paper and deposits the whole list of names delivered and deposited as aforesaid, the law duly observed, there is no doubt in the minds of this court that some of those names drawn would have been those of Negroes. Once in the "jury box" these names in the course of the regular drawing of said jurors for the said term of fifty names for the first week, thirty names for the second week, thirty names for the third week, thirty names for the fourth week, thirty names for the fifth week and thirty names for the sixth week,

making a total of two hundred names to have been drawn for that term of the circuit court at which the indictment was returned. Could it be probable or reasonable to suppose that all the names so drawn to the number of two hundred would have by chance been all names of white men? We briefly occupy this position to advise the court as to what would have been the situation, conceeding that the state law was fully complied with though, as has been stated, the drawing and forming the respective juries for said term of the circuit court all the names so drawn were those of white men.

There is a presumption always in favor of the due regularity of all legal proceedings, which are apparently regular upon the face of the record thereof, and it is with due respect to this presumption, that we have dealt so lengthily on this feature of the subject, that the court will be more fully conversant with the true history of the case, and the just merit of our contention. When we look to the record here before us and observe that the accused boldly charged, and asserted in the presence of the jury officers of the county, that because of the great prejudice prevailing against him, among the white race, with which race the said jury officers were identified; which officers under the law were charged with the duty of forming the grand jury for said December term 1892, did purposely disregard the state law, and thereby did with the intent so to do, select as such jurors for said December term, an entire white jury, to the entire exclusion of all Negroes of the county aforesaid, though legally qualified for such jury service: and that such exclusion by said officers, of the Negroes, was purposely made on account of their race and color.

We submit to the court, in all candor that the charges so made by the accused were grave, and merited some apprehension on the part of those charged, and the prompt investigation on part of the trial court.

The argument might be advanced, that, as the exclusion complained of is shown upon the face of the petition for such removal, to have been the unauthorized acts of individuals acting in disregard of the laws and hence not binding on the state; that the state is not responsible for the acts of persons in official positions, who act contrary to the rule prescribed by the constitution or Legislature thereof; and as the laws of the state are not complained of by the accused, no remedy lies: but such a position is in discord with the *principles* underlying the 14th Amendment to the Federal Constitution; especially in the state where the Negroes duly qualified in one of its counties for jury service in the circuit courts of such county, number seven thousand, to the number of fifteen hundred whites so qualified; and where the race prejudice prevails as it does in Washington county, Mississippi: such a state through its people in its organic law, or Legislature, may enact the finest kind of laws, and spread them upon its constitution or statutes, merely to avoid federal interference: yet, permit her officers (who are of the white race the dominant race) to try white persons touching their life, liberty and property, strictly in accordance with the laws of the state, and try Negros touching their same interests contrary to the laws; thus accomplishing in an indirect manner the very deprivation, which the people of the United States sought to prohibit by the enactment of the 14th Amendment. We are to look to the spirit of the law of the said amendment, and thus it will be seen that there is no sound principle supporting the doctrine so advanced by the defendant

in error: it is well settled by the doctrine of this court that rights granted to the Federal Government by the people of the country, federal jurisdiction thereof becomes postive; and the rights so reserved, and inhibition so declared, stand out preeminently supreme, and bid defiance to the slightest infraction on the part of any state authories, whether by letter of the laws or the executive or judicial officers, acting in their official capacities: and no state can violate these superior rules, with or without the consent of the person in whose case such reservation is shown upon the face of the proceedings to exist.

In all trials there are certain duties to be performed by the court; and a certain degree of diligence must be exercised by the accused: the court is supposed to sit in judgment upon all matters of law arising during the progress of the trial; it is not insisted that the court could have had judicial knowledge of any irregularity on the part of the officers of Washington County, touching the rights of the accused in the indictment in question, in the performance of their duties in that regard as complained of, until brought to its judicial notice: we respect the presumption of due regularity always attending the acts of officers when apparently regular upon the face of the proceedings; although the court might have known that there were seven thousand qualified jurors of the Negro race in the county at the time of drawing said grand jury and only fifteen hundred whites so qualified under the law, at the the time the list of two hundred names were by the said jury officers drawn to accommodate the said December term of the said circuit court; and from the number summoned to appear at the first week of said term from which number the grand jury in question was drawn, sworn and charged, no Negro was seen upon said jury; in all this there is nothiug to apprise the court judicially of any irregularity in the conduct of the said officers in the discharge of their official duties, resulting in any discrimination against the accused; although the court did have judicial knowledge of the presentment on the indictment returned by the grand jury aforesaid, which the court judicially knew to have been apparently regularly empanelled for that term: up to this stage of the proceedings the trial court, as a court, was not a party to any such discrimination as charged. It was the duty of the court to proceed regularly on with the trial; but at the January term, 1895, when the accused was about to be put upon his trial under the said indictment, he attacted the regularity and validity of the said indictment; and while the Federal Constitution has prescribed no relief for one deprived of that equal protection of the laws of the State to the enjoyment of which the accused is by the Federal Constitution guaranteed, yet the remedy for such injury is provided for by Congress, which has prescribed that such a denial in a State court entitles the accused to the removal of his trial from the State court, where such right is denied, to the Federal District Court.

The plaintiff in error filed his petition for removal and thus duly informed the court of such denial and discrimination, by presenting a series of clear and distinct charges against the jury officers of the county and officers of the court in the presence and hearing of the parties charged, which we have here afore particularized and thereupon prayed the process of the court to compel the said officers to appear at the bar of the trial court, to be there examined under oath, touching the charges so made by him. See Record, page 3.

The Supreme Court of Mississippi inferred from its learned opinion,

handed down in this case that the matter of granting or denying this petition was in the discretion of the trial court. we urged then, as we do now, that the matter ceased to be one of discretion with the trial court; that when such willful and deliberate violations of the Federal Constitution and laws were charged, the court then had full judicial knowledge of all the facts of violations charged; it had noticed that in the face of such charges as serious in their nature as they were, undenied by the parties charged, the accused could not be tried under said indictment without suffering by such discrimination as charged: and the circumstances thus arising to the enlightment of the court enjoined upon it a solemn duty, and not the mere exercise of a judicial discretion. It called upon that court the performance of a sworn duty of upholding the constitution and laws of the United States, and the State of Mississippi. It was an endorsement on the part of the court of all the irregularities charged against the said officers and thereby riveted the responsibility of the gross discrimination, charged by the accused, upon the State of Mississippi; it cannot be denied that the jury officers of the county acting as charged in the petition for removal and the approval of those acts by the regularly established courts of the State, were not the acts of the State. The accused had exhausted his remedy and stood there, in a court, where a discrimination against him on the account of his race and color, was boldly charged and tacitly admitted, where it was also admitted tacitly that the white petit jury which was summoned and was present and ready to try him for his life was purposely selected of the white race, to the exclusion of the entire seven thousand qualified Negroes in the county on the account of their race and color, with the express intent to convict him of the highest criminal offense known to the laws of the State; the court denying this petition for removal stamped its judicial endorsement upon every act complained of by the accused.

Judging from the language of our supreme court of Mississippi, even though the charges so made were seriously presented to the trial court, in all the legal formality and solemnity possible, that court of original jurisdiction owed the accused no consideration, because of the fact that after the petition for removal was disposed of, no motion was made to quash the indictment; but we will submit, that the motion to quash the indictment would not in any way have emphasized the rights due the accused, as shown by the petition. The principles underlying this proposition is finally settled by this court Neal vs. Delaware—103 U. S. 370. "While a colored citizen, party to a trial involving his life, liberty or property, cannot claim as a matter of right, that his race shall have representation on the jury, and while a mixed jury in a particular case is not within the meaning of the constitution or always necessary to the equal protection of the laws; it is a right to which he is entitled, that in the selection of jurors to pass upno his life, liberty or property, there shall be no exclusion of his race or discrimination against them because of their color."

In Strauder vs West Va 100 U. S. 303, the trial court first denied the petition for removal, and the subsequent motion to quash the indictment array, and panel of jurors, Mr. Justice Strong delivered the opinion of this honorable court, who among other things touching the Fourteenth Amendment, said: "We have said more than once its (the Fourteenth Amendment) design was to protect an emancipated race, and to

strike down all possible legal discrimination against those who belong to it." This court through that same Mr. Justice Strong, in its opinion in that same case said, to quote further from 16 Wall [supra]: "In giving construction to any of these articles of amendments, it is necessary to keep steadily in view the main purpose. It is so clearly a provision for that race and that emergency, that a strong case would be necessary for its application to any other." This court further addressing itself to that amendment and its purpose, pursuing the doctrine laid down in in 16 Wall, said, "Any State *action* that denies this immunity to a colored man, is in conflict with the constitution. A right or immunity whether created by the constitution, or only guaranteed by it, even without express delegation of power, may be protected by Congress. Prigg vs Com. 16 Pet.—536" "Rights and immunities created by or dependent upon the Constitution of the United States can be protected by Congress. The form and manner of the protection may be such as Congress in the legitimate exercise of its legislative discretion shall provide. These may be varied to meet the necessities of the particular right to be protected." Now the court will observe that our contention in the case at bar, is that the acts of the officers of the law of the county of Washington, State of Mississippi, resulted in a wilful discrimination against the accused; and the doctrine of this court defining the authority which Congress has for the enforcement of such rights as are enumerated in the Fourteenth Amendment, but more clearly emphasizes the rights intended to be reserved to each individual for whose benefit and protection, the sovereignty of the land enacted this law.

This principle is so thoroughly imbedded in the fundamental law that mere uncertainty in the letter of the Federal statute, in not prescribing how, a State could discriminate agains an individual in the manner prohibited by the Fourteenth Amendment, can work no lasting comfort to those desiring to take advantage of this lack of certainty in the language of the statute in that behalf. This court, however, in further treating the subject in the case last cited, Strauder vs. West Virginia, said: "But there is express authority to protect the rights and immunities referred to in the Fourteenth Amendment, and to enforce observance of them by appropriate congressional legislation; and one very efficient and appropriate mode of extending such protection and securing to a party the enjoyment of the right or immunity, is a law providing for the removal of his case from a State court in which the right is denied by the State law, into a Federal court where it will be upheld." This honorable court in that case after citing a number of authorities, wherein the principles contended for in the case at issue were affirmed, distinctly decided that wherever the right to equal protection of the laws of the State is denied by that State to a colored person, such denial unquestionably establishes a case for removal of the trial in the proper Federal court under Section 641 of the R. S. If by the Constitutional amendment the accused was entitled to an immunity from discrimination against him on the account of his color, in the selection of jurors he was entitled to the relief prescribed by the Federal statute, whenever that discrimination was brought to the judicial notice of the court.

This court in the case of Strauder vs West Virginia, distinctly declared one of the errors in the proceedings in the trial court to have been that of proceeding with the trial of the indictment against the accused, after his petition for removal was filed; the court further held

that there was error in each respective ruling of the trial court in overruling the motions to quash the indictment, and the array and panel of jurors Now then knowing as we do, that the judgment of this court means law, it seems to be clearly settled, that when a federal question is once shown to exist, upon the face of any proceeding in a state court, that fact at once establishes federal jurisdiction: and when one in whose behalf that jurisdiction sta ds takes the regular steps to invoke the operation of such federal jurisdiction in the form and manner prescribed by law, such beneficiary then, as a matter of right must be given the benefit of that relief, found only in the active assumption of jurisdiction by the federal authority; granted by the people and prescribed by their Congress, that is a removal of the trial from the state to the Federal District Court and we safely assert that that right under the Federal Constitution and laws, must be then and there accorded. It is a high and independent right, not dependent upon other collateral steps to be taken by the accused, to insure its benefits, as in the case at bar: if the petition filed by John Gibson in the circuit court of Washington County, Mississippi, showed upon its face a federal question, sufficient of itself to establish federal jurisdiction, then the technical requirement intimated by the opinion of the honorable Supreme Court of that state, that the accused should have made a motion to quash the indictment, fell short of depriving him of the federal right shown to exist upon the face of the said petition for removal: had a motion to quash the indictment been made, the grounds therefor would necessarily have been the same as charged in the petition for removal, because no other facts at that time were brought to the notice of the trial court, and the records showed no new facts of that character to be reviewed by the State Supreme Court; then with no new grounds alleged, where is the reason which could have prompted the honorable State Supreme Court in holding by inference that the mere form of making a motion to quash the indictment was necessary to make complete the right of the accused to the removal of his trial. This position is wholesomely maintained by the opinion of this court in the case of Strauder vs West Virginia, in passing, first upon the ruling of the trial court in denying the petition for removal; this action of the trial court was reviewed and passed upon separately by this court, and declared error; this error was declared by this court because upon a review of the petition for removal, there appeared upon its face the existence of a federal question; then suppose Strauder had made no motion to quash the indictment after the trial court disposed of his petitition for removal, and had proceeded to trial as the plaintiff in error herein did, would not the error in overruling the petition for removal have entitled Strauder to a reversal? though it is true Strauder made several motions, one to quash the indictment, another to quash the array of jurors, and another to quash the panel of jurors; and in each one of these proceedings, this court pronounced distinctly that there was error committed by the trial court in overruling the respective applications: therefore in the case at bar, no further step was taken by the accused in the trial court to invoke federal interposition after having shown the existence of his right to such relief upon the face of his petition for removal; and upon this rock we stand as an American citizen, clearly asserting our right to equal protection of the laws of the state of Mississippi; defying that state to deprive the accused of his life, or liberty contrary thereto, or

to discriminate against him on account of his race and color; and we now appeal to this honorable court to know if under its doctrine our position in the premises is not secure. It has already been conceded that a right secured by the constitution to an individual can not be waived with or without his consent, and especially in a case of this character where the penalty upon conviction is death.

The accused lost no right, merely because he did not move the trial court to quash the indictment. It became the duty of the court to have granted the petition for the removal, or of its own motion upon the facts charged and proven in the petition to have quashed the indictment, which latter action would have immediately divested all Federal jurisdiction and fully restored the jurisdiction of the State court. The question as to whether the petition for removal disclosed a case of denial of the constitutional right guaranteed him under the Fourteenth Amendment thereof is for this honorable court to answer by its judgment; if the acts of the officers of said county as charged in said petition constitutes a denial on part of the State in the manner prohibited by the said amendment; this honorable court declared in Bush vs Kentucky 107 United States, 110, wherein Mr. Justice Harlan delivering the opinion of this court among other things, said: "Again, it was declared that a denial upon the part of the officers of the State, charged with the duties in that regard of the right of a colored man, to a selection of grand and petit jurors without discrimination against his race because of their color, would be a violotion of the constitution and laws of the United States, which the trial court was bound to address. As said by us in Va. vs. Rives, the court will correct the wrong, will quash the indictment or the panel, or, if not, the error will be corrected in a Superior Court, and ultimately in this court upon review." 103 U. S.—394.—[Chap. xxvi.—57..]."

We contend that this court has outlined the duties of the trial courts in the States and of the Supreme Courts of the States under such circumstances; and surely what this court has declared upon this question is the law by which all state courts must be governed.

We have clearly shown the merit there is in the petition for removal; now the question to be disposed of is, what proof did we make in support of the petition. The record shows that the prisoner made affidavit to the facts set out in the said petition; the affiidavit is upon knowledge and belief. The court will here take judicial notice that under the state laws of Mississippi, a prisoner's oath is given full credence in the state courts as shown by Section 1741 of existing statute.

"The accused shall be a competent witness for himself in any prosecution for crime against him, but the failure of the accused in any case to testify, shall not operate to his prejudice or be commented on by the counsel." And upon this point, touching the proof in support of our application for removal, and the character of proof necessary to establish a *prima facia* case, this court has laid down the laws in such cases, as shown in Neal vs Delaware, 103 U. S.—370 in the following language, handed down by Mr. Justice Harlan, "An affidavit of the prisoner, that citizens of color were so excluded because of their color, supported by the fact that out of one hundred and fifty thousand population, no one of the twenty thousand colored persons included therein, has ever been summoned as a juror, is a *prima facia* case in support of the motion."

Our affidavit is more specific as to the number of colored persons of Washington County qualified for jury service, than the affidavit in the case just cited; wherein this court declared a *prima facia* case to exist. In our case the prisoner swore, distinctly that pernicious practices had been resorted to by the officers of the county, who by said practices wilfully, and intentionally excluded all colored persons of the county, though qualified for jury service to the number of seven thousand from said jury, which indicted the accused, which exclusion was on the account of the race and color of said jurors so excluded, and that said officers discriminated against him thereby purposely on the account of his race and color. In the opinion of this court in Neal vs Delaware, wherein the *prima facia* case was declared to exist, nothing was said as to how many colored persons were duly qualified for jury service in that county in the State of Delaware; but where it was sworn to, that out of twenty thousand colored people in the county, none were known to serve as jurors, this court declared that the case of illegal discrimination was clearly established and when the trial court in the case at bar, failed to recognize the rulings at this court, it fell within the condemnation of the soundest legal criticism, such as is announced in Cooley on Constitutional limitations. page 200, as follows: "The moment a court substitutes its judgment, for that of the legislature, in any cause where the constitution has vested the legislature with power over the subjects, that moment it enters upon a field where it is impossible to set limits to its authority, and where its discretion alone will measure the extent of its interference."

The Federal Constitution is a code of granted organic powers, defined by the highest authority in the federal state, and these powers so granted are intended by the grantors thereof for the perpetual preservation of this superior state, which is inseparable and indissoluble: and this court being the highest judicial function, having proper jurisdiction over matters respecting such granted powers, and the relief sought by the petition for removal in this cause, is among the rights enumerated in the Constitution of the United States; and having laid down the law involving a construction of the Federal Constitution, wherein such discrimination as charged in the petition for removal was declared a violation to the Fourteenth Amendment to the Federal Constitution, and that judgment, coming as it did from the highest court in the nation with full jurisdiction over the subject reviewed thereby, becomes of equal binding force on the actions of all interior courts in the nation, as were the words in which such judgment was written expressed upon the face of the Federal Constitution or the federal statutes; thus we cite Cooley on Constitutional limitations pape 18, note 3, Green vs Lesse 6 Pet. 291 298, wherein Mr. Justice Marshall handed down the opinion of the court, said: " We receive the construction given by the court of the nation as the true sense of the law and feel ourselves no more at liberty to depart from that construction than to depart from the words of the statute. On this principle the construction given by this court to the Constitution and laws of the United States, is received by all as the true construction;" therefore when the trial court of Mississippi failed to grant the petition for removal, as prayed for in said petition, or to quash the indictment of its own motion; and the State Supreme Court declined to grant the proper relief, the State of Mississippi has wilfully and intentionally violated the Constitution and laws of the United States, in discriminating against the plaintiff in error on the account of

DEC
JAMES H. McKE

Supreme Court of the United States.

October Term 1893.

JOHN GIBSON, PLAINTIFF IN ERROR.

No. 711. vs.

THE STATE OF MISSISSIPPI, DEFENDANT IN ERROR.

STATEMENT AND BRIEF FOR THE STATE OF MISSISSIPPI.

Johnston

The Supreme Court of the United States.

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JOHN GIBSON, PLAINTIFF IN ERROR.

No. 711. vs.

THE STATE OF MISSISSIPPI, DEFENDANT IN ERROR.

STATEMENT AND BRIEF FOR THE STATE OF MISSISSIPPI.

STATEMENT.

At the December Term, 1892, of the Circuit Court of Washington county, in the State of Mississippi, the plaintiff in error was indicted for the murder of one Bob Stinson.

At the January Term 1895, of said Court, the plaintiff in error was tried, and for the third time convicted of murder, and sentenced to death. The two preceding convictions had been reversed for errors of law by the Supreme Court of the State.

From this judgment, entered in January, 1895, there was an appeal to the Supreme Court of the State by the accused, in which all of the questions presented or raised in the Circuit Court of Washington county, including the question of the granting a new trial, were fully argued by counsel, and carefully considered by the Supreme Court.

After the reversal and granting of a new trial on the second appeal to the Supreme Court of the State, the accused, at the January Term, 1895, of the Circuit Court of Washington

county, presented a petition for the removal of the case from the State Court to the United States Circuit Court for the Western Division of the Southern District of Mississippi.

The two grounds for the application for removal are:

FIRST: In January, 1892, when the homicide was committed for which the accusdd was convicted, the qualifications of grand and petit jurors were defined by Section 264 of the State Constitution of 1890, which is as follows:

"No person shall be a grand or petit juror unless a qualified elector and able to read and write; but the want of any such qualification in any juror shall not vitiate any indictment or verdict. The legislature shall provide by law for procuring a list of persons so qualified, and the drawing therefrom of grand and petit jurors for each term of the circuit court."

While section 2358 of the Code of 1892, which went into operation on November 1st, 1892, provides, that the Board of Supervisors in selecting the grand and petit jurors to serve at the two ensuing terms of the Circuit Courts; "shall select and list the names of qualified persons of good intelligence, sound judgment and fair character, and shall take them, as nearly as it conveniently can from the several election districts, in proportion to the number of the qualified persons in each."

Under the Code of 1880, which was the statutory law in force at the time of the adoption of the Constitution of 1890, the qualifications of jurors were thus defined by section 1661:

"All male citizens of the United States and not being under the age of twenty-one years nor over the age of sixty years and not having been convicted of any infamous crime shall be qualified to serve as jurors within the county of their residence."

Section 1664, of the Code of 1880, provided that, "the board of supervisors shall at least twenty days before every term of the circuit court select twenty persons competent to serve as jurors in said county to be taken, as nearly as conveniently may be, in equal numbers from each supervisor's district of the county, who shall serve as grand jurors for the next ensuing term of said court."

Section 283 of the State Constitution of 1890 is as follows:

"All crimes and misdemeanors and penal actions shall be tried, prosecuted and punished as though no change had taken place, until otherwise provided by law."

Section 2358, of the Code of 1890, provided, under the directions of the constitutional provision, how these jurors should be drawn

The contention is, that the accused should have been tried under the provisions of the Code of 1880, and not under the provisions of section 264 of the Constitution of 1890, and section 2358 of the Code of 1892, and that upon this ground the right of removal existed, as the Fourteenth Amendment to the Constution of the United States, declares that no State shall, "deny to any person within its jurisdiction the equal protection of the laws," and that no citizen shall be tried without "due process of law."

SECOND. The petition for the removal states the second ground for the removal of the cause as follows:

"Relator states that on the 9th day of January 1892, Robert Stinson, a white man, was killed at Refuge plantation in said county, and that he was accused of the homicide; that prosecution against him had been commenced before the adoption of the Code of 1892: that by reason of the great prejudice against him by the officers charged with the selection of the said jury of grand inquest for the said December term of the said circuit court, which officers so charged are all members of the white race, and the relator herein being a member of the black race, black in color. Although at the time of selecting the grand jurors for the said December term, 1892, there were in the five supervisor's districts of the said county of Washington 7,000 colored citizens competent for jury service of the county of Washington, State of Mississippi, and 1,500 white qualified to serve as jurors in said county, there had not been for a number of years any colored man ever summoned on the grand jury of said county court; and that the colored citizens were purposely, on account of their color, excluded from jury service by the officers of the law charged with the selection of said jurors. Relator states that by reason of the great prejudice against him in this matter that the said officers of the law charged with the selection of said grand jurors for the December term, 1892, on account of his color, being that of a negro, black, and the deceased being that of a white man of

the white race, in selecting persons to serve as grand jurors at said term, all colored men were purposely on account of their color excluded by said officers; and that the said grand jury did then and there, being all white men purposely selected on account of their color, presented the bill of indictment against relator for the murder of Robert Stinson aforesaid, on account of his color, and pray summon for witnesses to prove same. Relator avers that by reason of the great prejudice against him on account of his color, he could not secure a fair and impartial trial by an impartial petit jury of the county of Washington, State aforesaid, and prays an opportunity to subpœna witnesses to prove the same, and, therefore, after hearing same, doth pray the removal of his cause from this court to the United States Circuit Court for the Western division of the Southern District of Mississippi; and that record hereof be properly certified to said court by an order from this court. And in duty bound doth forever pray, &c.

The application for the removal was denied by the Circuit court of the State.

On the trial, the accused demanded a special venire from which the jury should be selected, which was accorded to him by the court. It appearing that the regular jury box containing the names of jurors, was not a legal jury box, and because there were but few names of jurors therein, the motion of the defendant to quash the jury box was sustained by the Court, and the Court then, in accordance with the law of the State, and upon the motion of the defendant, issued a special writ to issue to the Sheriff commanding him to summon fifty qualified jurors from whom the jury was to be selected.

Upon the return of this writ, the defendant moved to quash this special venire, on the following grounds:

"First. Because the record shows that the Court ordered the Sheriff of Washington county on said date, in said State, as follows:

To the Sheriff of Washington county, in said State: You are hereby commanded to summon fifty men from the good and lawful body of Washington county, &c."

Said order fails to command the Sheriff to summon 'persons qualified as jurors,' or to summon said fifty men, 'jurors' as required by law, and further, said writ and return is not in accordance with the law.

Second. Because the order directs the Sheriff aforesaid to summon said fifty men to serve as a special venire in the case of the State vs. John Gibson, while the order should have directed the Sheriff to summon fifty men or persons as jurors, and to serve as jurors in the case of the State vs. John Gibson, as special jurors."

This motion was denied by the Circuit Court.

The entry upon the minutes of the Court, corrected by the direction of the Court to conform to the order as made in fact for this special venire, is as follows:

"This day appeared the defendant, Jonh Gibson, in his own proper person, who demanded a special venire of fifty men, and the court having allowed said special venire of fifty men, and the said jury box having been quashed on application of defendant, it is ordered that special venire facias issue to the Sheriff of Washington county, Mississippi, commanding him to summon from the good and lawful body of Washington county said fifty good and lawful and qualified jurors to be and appear before this court on Friday, January 11th, 1895, at 9 o'clock a. m., to serve especially as jurors in this cause. And that the Sheriff serve on the defendant or his counsel a copy of this writ of venire facias, to gether with his return thereon, showing the names of the persons so summoned, and also a copy of this indictment aforesaid, at least one entire day before said 11th day of January, 1895. (January 7th. 1895.)"

The trial then proceeded, resulting in the conviction of the accused of the crime of murder. During the progress of the trial various legal questions arose upon the competency of evidence, and upon the instructions in respect to the law of the case, which are immaterial and need not be stated.

From this judgment the accused prosecuted an appeal to the Supreme Court of the State, where the case was heard upon an assignment of errors containing twenty-four grounds assigned as error, and embracing all the rulings of the Circuit Court.

The opinion of the Supreme Court of the State is as follows:

WHITFIELD, J.| delivered the opinion of the Court.

There was no error in overruling the motion to remove the case to the Federal Court. This is settled by the case of Neal vs. Delaware, 103, U. S., 379.

There was no motion here to quash the indictment.

The eleventh instruction for the defendant was properly

refused. It authorized the jury conclusively to infer from the fact—if they believe from the evidence that it was the fact—that Stinson left the house with the purpose of provoking a difficulty; that that purpose continued, and Stinson did, in fact, provoke it, and was the aggressor, unless the State proved the contrary. The whole evidence was to be looked to in arriving at a just conclusion as to the conduct of the parties at the time. The instruction was misleading.

The fifteenth instruction announces what seems already fully covered by the tenth and sixteenth instructions granted to the defendant; and its refusal, if error, is not reversible error. Its refusal could have worked no harm.

There are twenty-four assignments of error, but we find no reversible error.

Of the sufficiency of the evidence the jury are the judges, and this is the third verdict of guilty of murder. We do not feel warranted, after the most careful consideration of the case, in disturbing the verdict.

Affirmed."

The plaintiff in error prayed and obtained a writ of error from this Court to review the judgment of the Supreme Court of the State.

The errors assigned, are as follows:

"(1) The trial court erred in denying the petition for removal from the State court to the Federal Court.

(2) The trial court erred in overruling the motion to quash the special venire.

(3) The trial court erred in overruling the motion for a new trial.

(4) The trial court erred in correcting the minutes of the first day of trial, on the return day of the venire, by modifying the original order directing the issuance of the said venire facias.

(5) The Supreme Court of the State of Mississippi erred in sustaining the ruling of the trial court in the denial of the petition for removal to the Federal District Court.

(6) The said Supreme Court erred in affirming the judgment of the trial court and fixing the 17th day of July 1895, as the day of execution of the said judgment."

BRIEF.

THE QUESTION OF REMOVAL

There are no laws in existence in the State of Mississippi which are in conflict with the constitution of the United States or the amendments thereto. There are no discriminations made by the Constitution of the State, or by any laws of the State, betweeen any classes of the citizens of the State in respect to personal or civil rights, or political franchises or privileges. All of the laws of the State, constitutional and statutory, apply to all ot the citizens of the State alike, without partiality or discrimination.

The State therefore, has not made any law which offends the provisions of the Fourteenth Amendment to the Federal Constitution, and this case does not come within section 641 of the Revised Statutes of the United States, nor within any Federal Statute providing for the removal of causes from the State to the Federal Courts.

The .act that officials charged with the enforcement of the laws of the State, which are constitutional and valid, have violated the State laws, and without legal authority derived from the State have discriminated against any citizen, does not bring a case within the removal acts of Congress.

Section 641 of the Revised Statutes provides for a removal; "When any civil suit or prosecution is commenced in any State Court, for any cause whatsoever, against any person who is denied or cannot enforce in the judicial tribunals of the State, or in the part of the State where such suit or prosicution is pending, any right secured to him by any law providing for the equal civil rights of citizens of the United States."

In Neal vs. Delaware, Mr. Justice Harlan, in delivering the opinion of the Court, said:

"The Constitutional Amendment is broader than the provisions of Section 641 of the Revised Statutes, that since that

section only authorized a removal before trial, it did not embrace a case in which a right is denied by judicial action during the trial, or in the sentence, or in the mode of executing the sentence; that for denials, arising from judicial action, after the trial commences, the remedy lay in the revisory power of the higher courts of the State, and, ultimately, in the power of review which this court may exercise over their judgments, whenever rights, privileges, or immunities, secured by the Constitution or laws of the United States, are withheld or violated; and that the denial or inability to enforce in the judicial tribunals of the states rights secured by any law providing for the equal civil right of citizens of the United States, to which section 641 refers, is primarily, if not exclusively, a denial of such rights, or an inability to enforce them, resulting from the Constitution or laws of the State, rather than a denial first made manifest at the trial of the case. We held that Congress had not authorized a removal when jury commissioners, or other subordinate officers, had, without authority derived from the Constitution and laws of the State, excluded colored citizens from juries because of their race ''

Neal vs. Delaware 103, U. S. 386.

In Neal vs. Delaware, the decision of the Court, in Virginia vs. Rives, (100 U. S. 313,) Strauder vs. West Virginia, (Id 315) and ex parte, Virginia (Id. 339) were carefully reviewed and the doctrines therein announced reaffirmed. Mr. Justice Strong, in delivering the opinion of the court, in Virginia vs. Rieves, in respect to the scope and operation of section 641 of the Revised Statutes, said:

''It is evident. therefore, that the denial or inability to enforce in the judicial tribunals of the State, rights secured to a defendant by any law providing for the equal civil rights of all persons of the United States, of which section 641 speaks, is primarily, if not exclusively, a denial of such rights, or an inability to enforce them, resulting from the Constitution or laws of the State, rather than a denial first made manifest at the trial of the case. In other words, the statute has reference to a legislative denial, or an inability resulting from it. The statute was not therefore

intended as a corrective of errors or wrongs committed by judicial tribunals in the administration of the law at the trial."

It was expressly admitted in Virginia vs. Rives, as in the case now before the court, that the laws of the State made no discrimination against the colored citizens because of their color, nor any discrimination at all.

Virginia vs. Rives, 100, U. S. 319. 320,

Mr. Justice Fields, in his separate opinion in Virginia vs. Rives, expressed the following concurring views:

"The denial of rights, or the inability to enforce them, to which the section refers, is, in my opinion, such as arises from legislative action of the State. If an executive or judicial officer exercises power with which he is not invested by law, and does unauthorized acts, the State is not responsible for them. The action of the judicial officer in such a case, where the rights of a citizen under the laws of the United States are disregarded, may be reviewed and corrected or reversed by this court; it cannot be imputed to the State, so as to make it evidence that she in her sovereign or legislative capacity denies the rights invaded, or refuses to allow their enforcement."

Virginia vs. Rives, 100, U. S. 333.

The doctrine, thus interpreting and defining the operation and effect of section 641 of the Revised Statutes in connection with the Fourteenth Amendment, has been so clearly announced and re-affirmed by this Honorable Court, that the question now before the Court must be considered as finally adjudicated and settled.

It is further suggested in the petition for the removal of the case:

"That under section 283 of the new Constitution of Mississippi the indictment returned against him should have been by a jury of the grand inquest of the said county, under the laws of the Code of said State, adopted in 1880, because the crime for which this indictment was returned is alleged to have been committed in January, 1892, before the Code of 1892 took effect."

This view arises out of a misconception of the application and operation of section 283, of the State Constitution.

Prior to the homicide for which the plaintiff in error was convicted, the State Constitution was adopted, changing the qualifications of jurors.

Section 283, of the Constitution provided that:

"All crimes and misdemeanors, and penal actions shall be prosecuted and punished as though no change had taken place, until otherwise provided by law."

In other words, the statutory provisions relating to the mode and manner of conducting trials, and fixing the punishment of crimes, then in force, should remain the law for the trial and punishment of crimes and misdemeanors, until changed or amended by the Legislature. This did not refer to the qualifications of jurors as defined by section 264 of the Constitution which went into operation *proprio vigore*.

It could not have been the intention or purpose of section 283 of the Constitution, to have placed it in the power of the Legislature to postpone the operation of section 264 by failing to legislate on the subject. If this was its legal effect, then section 264 would never have become the law of the State until the Legislature had provided by law for a change in the qualifications of jurors. Section 264 of the Constitution needed no legislation to put it into operation. It is clear and explicit in its terms, declaring expressly that no person shall be a grand or petit juror unless he is a qualified elector and able to read and write. Its final clause is a mandatory direction to the Legislature, "to provide by law for procuring a list of persons so qualified, and the drawing therefrom of grand and petit jurors for each term of the Circuit court."

The qualifications of the jurors, grand and petit, were fixed by the first clause of the section, and nothing was left to the Legislature except the mere detail of providing for the list and the drawing of the jurors, which was provided for by the Code of 1892. The essential thing is, that the qualifications of the grand and petit jurors were fixed by the Constitution prior to commission of this homicide, while the mere details of making the lists and drawing the jurors were provided by the Code of 1892.

The mode of drawing the jurors, their qualifications having been previously defined by the Constitution, was a mere matter of detail which could not possibly have effected in the slightest degree the rights of any defendant. The purpose and effect was to secure fair and impartial grand and petit jurors for the trial of criminal cases. The sections, 264 and 283, of the Constitution are therefore distinct and independent of each other. The section prescribing the qualifications of jurors does not relate to the mode and manner, or mere procedure of the trial, nor to the prosecution and punishment of crimes and misdemeanors. Such a law is independent of and preceeds the trial.

The Code of 1892, which was enacted after the commission of the homicide by the plaintiff in error, directed the Boards of Supervisors, in selecting the lists of jurors, to serve in the Circuit Courts for the next two terms of the Circuit Court, to select and list the names of persons "of good intelligence, sound judgment and fair character." Code of 1892, Section 2358.

The names thus listed, were required by section 2361 of the Code of 1892, to be placed in the jury box. And by section 2365 of the Code of 1892, the grand and petit jurors for the term, were to be drawn under the direction of the Circuit Judge, in open court, or under the provisions of section 2367 the jurors might be drawn by the Circuit Judge in vacation, or if so directed by the Judge, by the Circuit and Chancery Clerks and the Sheriff of the county, who were to certify the list so drawn to the Circuit Clerk.

Under the Code of 1880, section 1664, the Boards of Supervisors were required to select twenty persons competent to serve as jurors, who should constitute the grand jury for the next term of the Circuit Court.

It is thus seen, that the mode of selecting the grand jurors as provided by the Code of 1880, was changed by the Code of 1892, so that instead of having the grand jurors selected arbitrarily by the Board of Supervisors, as provided by the former law, the later Code provided that all the jurors to serve at the two next succeeding terms of the Circuit Court, were to be selected by the Board of Supervisors from the lists of registered

voters and their names returned to the clerk of the circuit court, and placed in a jury box.

From this box the names of fifty jurors are to be drawn as provided by sections 2365 and 2367 of the Code of 1892, to serve as grand and petit jurors at the particular term of the circuit court.

The grand jurors, not less than fifteen nor more than twenty, in the discretion of the circuit court, are drawn from the list of persons in attendance as jurors in the following manner:

"The name of each juror shall be written on a separate slip of paper and put in a box or hat in open court, and there shall then be drawn out, by a person designated by the judge, the number directed by the court, and the jurors whose names are so drawn shall constitute the grand jury, and be impaneled and sworn as such." Section 2371, Code of 1892.

Sections 2358 and 2371, of the Code of 1892, one directing the Board of Supervisors to select persons, as jurors, of intelligence and fair character, and the other directing the grand jurors to be drawn by lot, in open Court, from the jurors thus selected and in attendance as jurors, are not *ex post facto* laws.

They could not possibly have operated to the prejudice or injury of the defendant, or to deprive him of any constitutional right, and their whole purpose and object was to secure to all citizens accused of crime the right to have a grand jury composed of intelligent, respectable and impartial persons, to investigate the charge, and a jury composed of the same character of persons to try the issue of their guilt or innocence.

The plaintiff in error, had, as all citizens of the United States have, the constitutional right of trial by a fair and impartial jury, and in all felonies to be presented by a legally qualified grand jury. But persons accused of crime have no vested or constitutional right to be presented by grand juror,s nor tried by petit jurors, according to the precise statutory qualifications in force at the time of the commission of the crime. Nor can they complain that a higher and better standard of intelligence and character is required by the subsequent law, provided the

cardinal principles of fairness and impartiality are not so offended by the subsequent statute as to prejudice any of the substantial rights of the defendant to a fair and impartial presentment and trial.

The statutes make no discrimination in respect to any classes of citizens of the State, their only purpose, in the interests of al citizens, is to secure the selection of persons properly qualified to perform the responsible duties of grand and petit jurors. It is difficult to perceive how any defendant in a criminal case can claim a vested legal right to be tried under a former law which prescribed such a low standard of qualifications for grand and petit jurors as admitted to these important functions, illiterate and ignorant persons, and persons of low moral character.

The legal profession has perceived and complained of the low standard of the qualifications of jurors that prevails in many of the States, and the ignorant and corrupt jurors that are often impaneled under the operation of such laws. The necessity for reform in this respect seems to be generally recognized. It would be a curious feature of reforms in this direction, if every person accused of crime could claim a constitutional right to demand that the vicious jury law in force at the time of his offence, should be followed in the trial of his case.

An *ex post facto* law, within the meaning of the Constitutional prohibition, must be of the following character:

(1.) It must make an act done before the passing of the law, and which was innocent when done, criminal and punish the person committing such act.

(2) Or, it must aggravate a crime or make it greater than when it was committed.

(3.) Or, it must change the punishment, and inflict a greater punishment than the law annexed to the crime when it was committed.

(4.) Or, such a law must alter the rules of evidence, and provide for less or different testimony than the law required at the time of the commission of the offence, in order to convict the offender.

Laws of this or similar character are unjust and oppressive,

and are prohibited by the Constitution.

Calder vs. Bull, 3, Dall, 390.

It was said by Chase, Justice, in the opinion of the Court, after defining the character of an *ex post facto* law:

"But I do not consider any law *ex post facto*, within the prohibition, that mollifies the rigor of the criminal law; but only those that create or aggravate the crime; or increase the punishment, or change the rules of evidence for the purpose of conviction." Calder vs. Bull 3, Dall 390.

This definition or characterization of an *ex post facto* law is quoted with approval by Judge Cooley in the text of his work of Constitutional Limitations.

Cooley on Constitutional Limitations, 265.

An *ex post facto* law was defined by Chief Justice Marshall, in Fletcher vs. Peck, to be a law, "which renders an act punishable in a manner in which it was not punishable when it was committed. Fletcher vs. Peck, 6 Cranch, 138.

With somewhat greater fulness it was characterized in Cummings vs. Missouri, as a law, "which imposes a punishishment for an act which was not punishable at the time it was committed, or imposes additional punishment to that then prescribed; or changes the rules of evidence, by which less or different testimony is sufficient to convict than was then required."

Cummings vs. Missouri, 4 Wall, 326.

It is manifest that the State statutes passed in accordance with the directions of the State Constitution and providing a list of the grand and petit jurors who were qualified according to the requirements of the Constitution, and providing for the drawing of the names of the jurors, as was also required by the Constitution of the State, are not of the character of *ex post facto* laws. Nor can the statutory direction to the Boards of Supervisors to select persons as jurors, "of intelligence, good judgment and fair character," be regarded as an *ex post fact* law, from any point of view. The direction might well have been omitted, as it would have been the duty of the Board of Supervisors to have selected competent persons, in the absence of any statutory directions on the subject.

Judge Cooley thus states the doctrine in respect to retrospective changes in respect to the modes of procedure in criminal cases:

"But so far as mere modes of procedure are concerned, a party has no more right, in a criminal than in a civil action, to insist, that his case shall be disposed of under the law in force when the act to be investigated is charged to have taken place. Remedies must always be under the control of the legislature, and it would create endless confusion in legal proceedings if every case was to be conducted only in accordance with the rules of practice, and heard only by the courts in existence, when its facts arose. The legislature may abolish courts and create new ones, and it may prescribe altogether different modes of procedure in its discretion, though it cannot lawfully, we think, in doing so dispense with any of those substantial protections with which the existing law surrounds the person accused of crime."

Cooley on Const. Limitations, 272.

A law giving the State additional challenges was held, in the following cases to be valid and constitutional, and not an *ex post facto* law.

Watson vs. Commonwealth, 16 B. Mon. 15.
State vs. Ryan, 13 Minn, 370.
State vs. Wilson, 45 N. H. 398.
Commonwealth vs. Dorsey, 103 Mass. 412,

A statute which authorized the amendments of indictments was applied in the trial of offences committed prior fo the passage of the law, and was held not to be *ex post facto*.

State vs. Manning, 14 Texas, 402.
Lasure vs. State, 18 Ohio. 43.

So also a law was upheld as constitutional and not *ex post facto*, passed after the commission of the offense, and which precluded a defendant from taking advantages of variances which did not prejudice him.

Commonwealth vs Hall, 97. Mass. 570.

In Gut vs. The State, this Court held, that a law of the State changing the place of trial from one county to another county in the same district, or even to a different district from

that in which the offence was committed, or the indictment was found, was not an *ex post facto* law, although passed subsequent to the commission of the offence or the finding of the indictment. Citing with approval Fletcher vs. Peck, and Cummings vs. Missouri. Gut vs. The State, 9, Wall. 36.

A law which provided a more elevated court or a more enlightened and learned Judge, or jurors of higher moral character and intelligence, to try offenders, not only protects the interests of the community, but it would afford the highest assurance that all the just rights of the accused would be observed and accorded to him.

It is respectfully submitted, that it plainly appears that these State statutes are not *ex post facto*, and in no possible view could they prejudice the rights of the defendant.

But if these statutes were regarded as *ex post facto* laws, upon construction, their existence would not bring the cause with the Federal Statute providing for the removal of cases from the State to the Federal Courts.

These Statutes do not in terms apply to offences committed prior to their passage, nor do they direct that their provisions shall be observed in the trial of such offences. They are general statues, enacted in general terms. They are in themselves valid and constitutional in all respects, as they do not directly provide that they shall be applied to the trial of offences committed before their enactment. It would therefore be a question for judicial consideration and decision, under the operation of the constitutional guarantees, and in view of the character of the statues, whether they should be construed as retroactive in their application and effect as the law for the trial of the particular case.

It was impossible to know at the time of the application for the removal of the cause, or before the trial of the case, what would be decision of the State Court on this question if it was raised upon the trial. If the statutes are correctly to be construed as not applying to the trial of offences committed before their enactment, it could not be assumed in advance of the trial, and on the application for the removal, that the State Court would

give the statutes a retroactive operation.

This Honorable Court has given the clearest and most emphatic expression of the view, that, in advance of the trial and on the petition for the removal, it cannot be assumed as ground for the removal of the case, that the rights secured to the defendant by the Federal Constitution, will be denied him on the trial by the State Court.

For the denial by the State Courts of rights protected by the Federal Constitution and the laws of Congress enacted thereunder, in the absence of any unconstitutional State statute, the ultimate remedy, as now provided by Congress, is upon a writ of error from the Supreme Court of the United States, to the State Court, and not by the removal of the cause. These views have been announced, and reaffirmed, by this Court, as containing the proper construction of the Fourteenth Amendment in connection with the Federal Statute providing for the removal of causes from the State to the Federal Courts.

Neal vs. Delaware, 103. U. S. 386.

Virginia vs. Rives, 100. U. S. 320.

The Circuit Court of the State, in accordance with the utterances of this Honorable Court, ruled correctly in denying the petition for removal; and the decision of the Supreme Court of the State in affirming the ruling of the trial Judge followed the principles of construction defined by this Court in the cases cited.

If the right claimed by the plaintiff in error to be indicted by a grand jury selected as provided by the Code of 1880, or composed of jurors of the qualifications prescribed by the Code of 1880, and this claim rested upon the construction and effect of Section 283 of the State Constitution of 1890, it is evident that no Federal question was involved, and no right of the plaintiff in error, protected by Federal authority, was brought in question.

The decisions of the State courts construing their own consitutions and laws are conclusive.

Randall vs. Brigham, 7, Wall, 541.

Provident Institution vs. Massachusetts, 6, Wall, 630.

The question of the right of the plaintiff in error to be in.

dicted by a grand jury drawn according to the directions of the State laws as contained in the Code of 1880, was never presented nor raised, or suggested in any manner by the plaintiff in error, during the progress of the trial. The indictment was treated by the plaintiff in error as valid, and he proceeded to trial without objection, upon his general plea of not guilty.

THE MOTION TO QUASH THE SPECIAL VENIRE.

This question may be briefly noticed.

The motion to quash the special venire ordered by the Court upon the request of the plaintiff in error, did not proceed upon the ground of any right given by Federal authority, but rested alone upon alleged technical irregularities in the order made by the Court. The entry on the minutes as orignally made, failed to designate the fifty persons directed to be summoned, as "qualified jurors," or to direct that they should serve "as jurors," in the case of the State vs. John Gibson.

The Court upon hearing the motion to quash, directed the entry to be corrected by the clerk, so as to show precisely the order and directions that were in fact made and given by the Court, in respect to the special venire. This corrected order appears in the record, and shows that the proper directions were given by the Court.

This, as well as all the other questions raised in the case, were carefully considered and decided by the Supreme court on the appeal from the judgment of the Circuit Court of the State.

There is only one Federal question presented in the case, and that is, whether the question of the right of the plaintiff in error to remove his case to the Federal court, was correctly decided by the State Court.

It is respectfully submitted that the judgment of the Supreme Court of the State should be affiirmed.

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